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Kirk J. Henderson

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*Kirk J. Henderson**

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* Assistant Public Defender in the Appellate Division of the Law Office of the Public Defender of Allegheny County, Pittsburgh, Pennsylvania; Adjunct Professor of Law, University of Pittsburgh School of Law; B.A., Allegheny College; J.D., Vanderbilt University. The views expressed in this article do not necessarily reflect the policies, opinions, or views of the Law Office of the Public Defender of Allegheny County or of any other member of that Office.

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I. INTRODUCTION

Persons accused of a crime, of course, have the constitutional right to effective assistance of counsel.[1] When that right is violated, defendants routinely seek a remedy through an appeal or a post-conviction proceeding. Until New Years Eve 2002, when the Pennsylvania Supreme Court decided *Commonwealth v. Grant*,[2] defendants in Pennsylvania had to raise any ineffectiveness issues in their direct appeal or suffer waiver of those issues.[3] *Grant*, however, changed the procedure to defer ineffectiveness issues to the post-conviction stage.[4]

The constitutional problem with this construct in Pennsylvania comes from the requirement that post-conviction relief only is available to those defendants currently serving a sentence.[5] If a defendant's sentence is so short that he or she will be unable to fully litigate an ineffectiveness issue before the sentence is com-

1. *See* Strickland v. Washington, 466 U.S. 668, 684 (1984).
2. 813 A.2d 726 (Pa. 2002).
3. *See* Commonwealth v. Dancer, 331 A.2d 435 (Pa. 1975), *abrogated by Grant*, 813 A.2d 726; Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977), *abrogated by Grant*, 813 A.2d 726; *see also infra* notes 8-17 and accompanying text.
4. *Grant*, 813 A.2d at 738.
5. 42 PA. CONS. STAT. § 9543(a)(1)(i) (1998); Commonwealth v. Ahlborn, 699 A.2d 718, 720 (Pa. 1997); *see infra* notes 60-61, 174-75, 203-07 and accompanying text.

pleted, the defendant will be deprived of any forum in which to seek enforcement of the right to effective assistance of counsel. When faced with an opportunity to correct this problem in 2005, the Pennsylvania Supreme Court, in *Commonwealth v. O'Berg*,[6] held that a short-sentence exception to *Grant* does not exist.[7] This means that defendants in that situation — innocent and guilty alike — must suffer the consequences of their conviction even if it occurred because trial counsel was not constitutionally effective.

This article will examine whether a state may divest a criminal defendant of any opportunity to argue that his or her trial attorney was constitutionally ineffective. This analysis will be made by considering Pennsylvania's system for litigating ineffectiveness issues and then by comparing it to constitutional standards governing counsel and the appellate process. The conclusion reached is that all defendants, regardless of the length of the sentence or the seriousness of the crime, have the constitutional right to argue that their trial attorney was ineffective.

The first part of this article will review the recent change in Pennsylvania case law that transformed the principle that ineffectiveness issues had to be raised on direct appeal to the requirement that they must be deferred to the post-conviction stage. The following section then examines the role of counsel in a criminal trial and how the right to counsel is the bedrock right that makes a fair trial possible. The article next discusses Pennsylvania's constitutional right to an appeal and whether this right is violated when short-sentence defendants may not ever argue on appeal that their attorney was constitutionally ineffective. After recognizing the right to an appeal, the next section then turns to a discussion of how due process guarantees assure that any appeal must be meaningful and must provide an adequate opportunity to litigate the issues to be raised. These due process guarantees apply to all defendants regardless of the length of their sentence and regardless of whether they are charged with less serious misdemeanors or more serious felonies.

This leads to the conclusion that defendants have a constitutional right to argue that their trial counsel was constitutionally ineffective. A state, such as Pennsylvania, may not create a system that deprives criminal defendants of every opportunity to vindicate their constitutional right to effective assistance of trial

6. 880 A.2d 597 (Pa. 2005).
7. *O'Berg*, 880 A.2d at 598.

counsel. This article ends by suggesting six different ways that the Pennsylvania Supreme Court and/or the Pennsylvania Legislature could modify the appellate or post-conviction system to allow short-sentence defendants one opportunity to argue that they have been wrongly convicted because of the errors of their attorney.

II. LITIGATING INEFFECTIVENESS ISSUES IN PENNSYLVANIA COURTS

A. *The Old Requirement That Ineffectiveness Issues Had to Be Raised on Direct Appeal*

From 1975 through the end of 2002, defendants in Pennsylvania were required on appeal to raise issues concerning the ineffectiveness of their trial counsel or the issues would be waived. This started as a general rule and quickly became absolute.

In *Commonwealth v. Dancer*,[8] decided in 1975, the Pennsylvania Supreme Court announced that, in general, ineffectiveness claims must be raised on direct appeal or else they will be deemed waived.[9] The court, however, recognized that this general rule required exceptions. The notable exceptions were that ineffectiveness issues did not have to be raised on direct appeal to avoid waiver when the appellate attorney was also the trial attorney and when the grounds for the ineffectiveness issue were not apparent on the existing record.[10]

Two years later, the supreme court made the *Dancer* rule absolute in *Commonwealth v. Hubbard*.[11] There, the court held that "ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effec-

8. 331 A.2d 435 (Pa. 1975), *abrogated by Grant*, 813 A.2d 726.

9. *Dancer*, 331 A.2d at 437-38.

10. *Id.* at 438. The *Dancer* court stated that ineffectiveness issues need not be raised on direct appeal:

> 1) where petitioner is represented on appeal by his trial counsel, for it is unrealistic to expect trial counsel on direct appeal to argue his own ineffectiveness, 2) where the petitioner is represented on appeal by new counsel, but the grounds upon which the claim of ineffective assistance are based do not appear in the trial record, 3) where the petitioner is able to prove the existence of other "extraordinary circumstances" justifying his failure to raise the issue . . . or 4) where the petitioner rebuts the presumption of "knowing and understanding failure."

Id. (quoting Post Conviction Hearing Act, 19 PA. STAT. ANN. §§ 1180-4(b)(2), 1180-4(c) (1965), *repealed and replaced by* Post-Conviction Relief Act, 42 PA. CONS. STAT. §§ 9541-9546 (1998)).

11. 372 A.2d 687 (Pa. 1977), *abrogated by Grant*, 813 A.2d 726.

tiveness is being challenged no longer represents the defendant."[12] This was true even if, as in that case, the new attorney only began representing the defendant during the brief post-sentence stage that lasted a mere ten days.[13]

If an ineffectiveness argument was not made on direct appeal, it could then be subsequently raised in a petition filed pursuant to the Post-Conviction Relief Act (PCRA),[14] though it faced additional hurdles.[15] Under the PCRA, a defendant could raise a claim when "the conviction or sentence resulted from . . . [i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."[16] To be eligible for relief under the PCRA, however, the defendant had to currently be serving a sentence.[17]

Through the end of 2002, any defendant had an opportunity to raise any ineffectiveness claims in a direct appeal. Though defendants with short sentences that had expired could not allege counsel's ineffectiveness under the PCRA, they at least had that one opportunity to raise the ineffectiveness issue on their direct appeal.

B. The Sea Change of Commonwealth v. Grant

This all changed on the final day of 2002 when the Pennsylvania Supreme Court handed down its decision in *Commonwealth v. Grant*.[18] Without being asked to do so by either party,[19] the Pennsylvania Supreme Court held that ineffectiveness issues no longer

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12. *Hubbard*, 372 A.2d at 695 n.6.

13. *Id.* at 695.

14. 42 PA. CONS. STAT. §§ 9541-9546.

15. For an analysis of the how the PCRA works, see Donald J. Harris, Kim Nieves & Thomas M. Place, *Dispatch and Delay: Post Conviction Relief Act Litigation in Non-Capital Cases*, 41 DUQ. L. REV. 467, 468-474 (2003).

16. 42 PA. CONS. STAT. § 9543(a)(2)(ii). The defendant at this stage would have to allege not only that trial counsel was ineffective, but also that prior appellate counsel also was ineffective for failing to raise the issue that trial counsel was ineffective. This process became know as "layering" the ineffectiveness claims, meaning that multiple layers of ineffectiveness needed to be proven. *See* Commonwealth v. Clayton, 816 A.2d 217, 219-20 (Pa. 2002). In other words, the defendant would have to prove that Counsel *B* was ineffective for failing to allege that Counsel *A* was ineffective.

17. 42 PA. CONS. STAT. § 9543(a)(1)(i); *see infra* notes 60-61, 174-75, 203-07 and accompanying text.

18. 813 A.2d 726 (Pa. 2002).

19. "[N]either party to this appeal advocates departure from present practice. Further, the view of the Attorney General of Pennsylvania, acting as *amicus curiae*, aligns with that of the parties . . . ." *Grant*, 813 A.2d at 740 (Saylor, J., concurring).

must be raised on direct appeal to avoid waiving these claims, overruling *Hubbard* and *Dancer*.[20] In a nutshell, the court believed that the better practice would be to defer[21] ineffectiveness arguments until the post-conviction stage rather than to require them on direct appeal.

The *Grant* court listed several main reasons for this shift. First, it said that "appellate courts in Pennsylvania routinely decline to entertain issues raised on appeal for the first time."[22] In virtually all cases, ineffectiveness arguments, by their nature, have never been raised prior to the appeal.[23] Because the trial court observed counsel's performance during the trial, it should be "in the best position to make findings related to both the quality of trial counsel's performance and the impact of any shortfalls in that representation."[24]

Second, the court said that the lack of a trial court opinion creates an impediment to appellate review.[25] In Pennsylvania, all appellants, when ordered to do so, must file a Rule 1925(b) statement, which informs the trial court of what issues will be raised on appeal.[26] From this statement, the trial court writes its opinion.[27] Presumably, the court believes that a trial court opinion cannot be written on an ineffectiveness issue when that issue was

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20. *Id.* at 738 (majority opinion).

21. The Pennsylvania Supreme Court has come to refer to *Grant*'s mandate as a "deferral rule." *See, e.g.*, Commonwealth v. Spotz, 870 A.2d 822 (Pa. 2005) ("general rule of deferral announced in *Grant*"), *cert. denied*, 126 S. Ct. 564 (2005); Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003) (referring to this circumstance as an exception to the general rule of deferral in *Grant*).

22. *Grant*, 813 A.2d at 733. The court pointed out that "the Pennsylvania Appellate Rules of Procedure specifically proscribe such review." *Id.* (citing PA. R. APP. P. 302(a)).

23. The exception to this is when a timely post-sentence motion has been filed alleging trial counsel's ineffectiveness. In this one scenario, the ineffectiveness issue has been presented before the appeal has begun. *See Bomar*, 826 A.2d at 853-55; *see also infra* notes 69-70 and accompanying text (discussing *Bomar*).

24. *Grant*, 813 A.2d at 736.

25. *Id.* at 733-34 (citing Commonwealth v. Lord, 719 A.2d 306, 308 (Pa. 1998)).

26. PA. R. APP. P. 1925(b). The purpose of the Rule 1925(b) statement is "to aid appellate review by providing a trial court the opportunity to focus its opinion upon only those issues that the appellant plans to raise on appeal." Commonwealth v. Castillo, 888 A.2d 775, 778 (Pa. 2005). This "allows for meaningful and effective appellate review." Commonwealth v. Schofield, 888 A.2d 771, 774 (Pa. 2005). Under Rule 1925(b), the statement must be filed within fourteen days of when the trial court orders it to be filed, though this time can be extended to allow for preparation of the transcripts and for counsel to have an opportunity to review them. Commonwealth v. Payson, 723 A.2d 695, 705 (Pa. Super. Ct. 1999). If additional time is needed to prepare the statement, it can be requested. *Castillo*, 888 A.2d at 778.

27. PA. R. APP. P. 1925(a).

only presented to it in the Rule 1925(b) statement rather than during trial proceedings.[28]

Third, the supreme court in *Grant* observed that "appellate courts normally do not consider matters outside the record or matters that involve a consideration of facts not in evidence."[29] Part of the nature of an ineffectiveness claim is that the trial attorney must not have had a reasonable basis for his or her actions or omissions.[30] In most cases, this only can be gleaned from questioning the trial attorney, which is evidence that would be outside of the record on appeal.

Fourth, and "[m]ost importantly" for the supreme court, "appellate courts do not act as fact finders, since to do so 'would require an assessment of the credibility of the testimony and that is clearly not our function.'"[31] The court pointed out that in deciding ineffectiveness arguments, "appellate courts often engage in some fact finding by being required to speculate as to the trial strategy of trial counsel in order to rule upon these claims."[32] In other words, an appellate court is not in the business of judging the credibility of witnesses who would testify about the attorney's alleged ineffectiveness or weighing the new evidence that might be part of an ineffectiveness claim. Instead, these functions properly rest in the trial court.

Finally, the *Grant* court said that it was concerned about the toll that the *Dancer/Hubbard* rule took on appellate attorneys who were required to raise not just record-based claims, but also any

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28. Commonwealth v. Davido, 868 A.2d 431, 441 n.16 (Pa. 2005), *cert. denied*, 126 S. Ct. 660 (2005). Prior to *Grant*, courts routinely would write opinions on ineffectiveness issues raised for the first time in the Rule 1925(b) statement. *See, e.g.*, Commonwealth v. D'Collanfield, 805 A.2d 1244, 1245 (Pa. Super. Ct. 2002) (pointing out that one of the defendant's issues was the ineffectiveness of trial counsel and the trial court wrote an opinion on this issue).

29. *Grant*, 813 A.2d at 734 (citing Commonwealth v. Rios, 684 A.2d 1025, 1036 n.11 (Pa. 1996)).

30. *Id.* at 736 ("Many of these [ineffectiveness] claims are based on omissions, which, by their very nature, do not appear on the record and thus, require further fact-finding, extra-record investigation and where necessary, an evidentiary hearing."). For the genesis of the reasonable-basis requirement, see Strickland v. Washington, 466 U.S. 668, 689-90 (1984) and Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987).

31. *Grant*, 813 A.2d at 734 (quoting Commonwealth v. Pierce, 645 A.2d 189, 198 (Pa. 1994) (and also citing Commonwealth v. Griffin, 515 A.2d 865, 869 (Pa. 1986)).

32. *Id.* In some cases prior to *Grant*, however, the court has found that the trial attorney could not possibly have had a reasonable basis for his or her actions and awarded a new trial without a remand to discover the attorney's reasons. *See, e.g.*, Commonwealth v. Costa, 742 A.2d 1076, 1077-78 (Pa. 1999) (counsel could not possibly have had a reasonable basis for failing to object to a comment on the defendant's constitutional right to remain silent; a new trial, thus, was awarded without a remand hearing).

extra-record ineffectiveness claims that might possibly exist.[33] In other words, in any appeal, the appellate attorney has to review the trial record and develop issues present there. A criminal defense attorney's job under *Dancer* and *Hubbard*, however, also included raising any additional, extra-record claims that were not presented at trial. Sometimes, the ineffectiveness is completely recognizable from the record, such as a failure to object to innately prejudicial testimony.[34] Other times, however, the ineffectiveness is apparent only after an extra-record investigation is conducted, such as locating and interviewing witnesses not called during the trial.[35] The court also said that it was concerned about appellate attorneys working under tight time constraints and that they might be hamstrung in fully developing an ineffectiveness issue on appeal.[36]

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33. *Grant*, 813 A.2d at 736-37. The court said:

> appellate counsel must not only scour the existing record for any issues, but also has the additional burden of raising any extra-record claims that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during trial and at sentencing.

Id. at 737.

34. *See* Commonwealth v. Johnson, 788 A.2d 985, 992 (Pa. Super. Ct. 2001). In Johnson, the trial attorney was ineffective for failing to object to the "innately prejudicial" testimony that the defendant had exercised his constitutional right to remain silent. *Johnson*, 788 A.2d at 992. By its nature, the essence of this claim was apparent from the record. *Id.* The court found that the attorney could not possibly have had a reasonable basis for failing to request a mistrial once the jury heard this inadmissible and prejudicial evidence. *Id.* Therefore, a remand hearing was not necessary to discover if counsel might have had a reasonable basis for failing to request a mistrial. *Id.* In short, the trial attorney's failure to object was apparent from the transcript without the need for any additional evidence or any additional investigation by the appellate attorney.

35. Commonwealth v. Harris, 785 A.2d 998, 1002 (Pa. Super. Ct. 2001) ("[W]e hold that Appellant's claim is of arguable merit, trial counsel had no reasonable basis or strategy for his inaction, and Appellant was prejudiced by counsel's failure to call character witnesses. Accordingly, we must reverse the judgment of sentence and remand for a new trial."), *allocatur denied*, 847 A.2d 1279 (Pa. 2004).

36. *Grant*, 813 A.2d at 737. The *Grant* court said that "[i]mportantly, appellate counsel must perform this Herculean task in the limited amount of time that is available for filing an appeal from the judgment of sentence — 30 days." *Id.* (citing PA. R. CRIM. P. 720). The thirty-day period to which the court refers concerns the amount of time a defendant has to file a notice of appeal. *See* PA. R. CRIM. P. 720(A). The court, however, missed the mark with this point. The ineffectiveness claim did not need to be identified and developed by the time the notice of appeal was filed. Instead, the appellant had until the Rule 1925(b) statement was filed with the trial court. An appellant always had *at least* fourteen days from the receipt of the transcript to file the Rule 1925(b) statement. *See* Commonwealth v. Payson, 723 A.2d 695, 705 (Pa. Super. Ct. 1999) (the trial court must provide an adequate period of time to review the transcripts before filing a Rule 1925(b) statement). Because transcripts typically take some time to prepare, this could add weeks or months to the time an appellant had to develop the ineffectiveness issues. *See* Harris et al., *supra* note 15, at 480 (obtaining the records and transcripts on some cases may take over six months). If more time would be needed after receipt of the transcripts, the appellant could always ask

Because of these factors, the *Grant* court believed that defendants would be better served by waiting until collateral review where they can more fully develop their claims and create a complete record. "Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel."[37]

After discussing the perceived problems with raising ineffectiveness claims on appeal, the court stopped short of banning them. It said that it was "overrule[ing] *Hubbard* to the extent that it requires that trial counsel's ineffectiveness be raised at that time when a petitioner obtains new counsel or those claims will be deemed waived."[38] In overruling *Hubbard* to this extent, the *Grant* court seemed to say that ineffectiveness arguments not raised on direct appeal are not necessarily waived. A criminal appellant would have the option to raise the ineffectiveness issue on direct appeal or else raise it later in a post-conviction proceeding if raising it on appeal proved to be ill advised.

This interpretation was reinforced by other language the court chose in announcing its holding in *Grant*. The court stated, "[w]e now hold that, *as a general rule*, a petitioner *should* wait to raise claims of ineffective assistance of trial counsel until collateral review."[39] Again relying upon the rationale that an ineffectiveness claim is not waived if not raised on direct appeal, the court wrote that, "[s]imply stated, a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness."[40] The majority then added that "[t]he purpose of the new rule [announced in *Grant*] will be served since defendants will no longer be *compelled* to raise ineffectiveness claims on an undeveloped record . . . ."[41] Also, the court said that "although the parties *may rely on the old rule of law and raise ineffectiveness claims [on appeal]*, neither party will be prejudiced since claims of ineffec-

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the trial court for more time. Commonwealth v. Castillo, 888 A.2d 775, 778 (Pa. 2005). While the court was correct that in some cases this created more work for the appellate attorney, it was a process that generally worked for a quarter century.

37. *Grant*, 813 A.2d at 738; *but see infra* notes 84-85 (offering the opposing view that the Sixth Amendment is better served by litigating ineffectiveness arguments on direct appeal).

38. *Grant*, 813 A.2d at 737.

39. *Id.* at 738 (emphasis added).

40. *Id.*

41. *Id.* (emphasis added).

tiveness can be raised in a collateral proceeding . . . ."[42] Finally, the court expressed its belief that neither party "will be harmed by application of the new rule . . . ."[43]

In other words, appellants can raise ineffectiveness issues if they want, but they need not raise them to avoid waiver. Furthermore, the court did not specifically say that ineffectiveness arguments could not be raised on direct appeal. Justice Castille's concurrence, in fact, bemoaned this limitation on the court's holding.[44] If some ineffectiveness issues cannot be raised on direct appeal, then certainly some defendants will be harmed by the *Grant* rule.

Lastly, the court hypothesized that the new *Grant* rule may require some exceptions despite the perceived difficulties with raising ineffectiveness issues on direct appeal. When a defendant has suffered "a complete or constructive denial of counsel" or when "counsel has breached his or her duty of loyalty" to the client, the court suggested that "this court may choose to create an exception to the general rule and review those claims on direct appeal."[45]

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42. *Id.* (emphasis added).

43. *Grant*, 813 A.2d at 738.

44. *Id.* at 742-43 (Castille, J., concurring and dissenting). According to Justice Castille:

> The word "should" does not bar appellants from raising new claims of trial counsel ineffectiveness on direct appeal: it therefore suggests an aspiration rather than an actual standard; it invites appellants to try to avoid the "general" rule; and it promises years of further confusion as the contours of the play in the new rule are litigated.

Id.

45. *Id.* at 738 n.14 (majority opinion). Justice Castille seems to have recognized why the court suggested these two possible exceptions to the *Grant* rule:

> [I]n situations where assistance of counsel in fact has been denied entirely or during a critical stage of the proceeding, or where counsel in fact actively represented conflicting interests, the defendant does not need to demonstrate the *Strickland* prejudice that would otherwise be required for a showing of ineffectiveness, *i.e.*, he need not show that, but for counsel's errors, the outcome of the proceeding would probably have been different.

Id. at 743 (Castille, J., concurring and dissenting) (citing Mickens v. Taylor, 535 U.S. 162, 166-67 (2002) and Smith v. Robbins, 528 U.S. 259, 287 (2000)). Justice Castille also imagined that allowing for an exception like this will encourage appellants to attempt to argue their way around *Grant*. He stated:

> The predictable consequence of the majority's dicta is that routine claims of counsel ineffectiveness will now be accompanied by an exaggerated assertion of the constructive denial of counsel — *i.e.*, the courts will see claims that counsel's performance in failing to raise an objection was so deficient that it was as if the defendant were unrepresented — merely in the hope of securing a preview round of collateral attack upon direct appeal.

Id.

The nature and number of any exceptions would wait for another day.[46]

C. *Applying the New* Grant *Rule: Flexible or Absolute?*

Just four months after *Grant* was decided, the United States Supreme Court addressed the same issue in *Massaro v. United States*.[47] There, the Court considered the government's invitation to hold that ineffectiveness claims could not be brought on direct appeal in federal court. The Court, in an opinion that cited favorably to *Grant*,[48] said that ineffectiveness arguments not raised in a direct appeal from a federal criminal conviction were not waived in a later habeas corpus proceeding.[49] In fact, the Court specifically noted that ineffectiveness arguments sometimes are appropriate in a direct appeal and should be raised there. The *Massaro* Court stated:

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.[50]

This holding, concerning appellate review of federal convictions in the federal courts, was not binding on the states, leaving the Pennsylvania Superior Court with the initial task of applying the seemingly-equivocal *Grant* rule. It has struggled with this task.

The vast majority of cases published by the superior court in the aftermath of *Grant* did not address any ineffectiveness issues, but instead punted these claims to the post-conviction stage.[51] The

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46. *Id.* at 738 n.14 (majority opinion) ("[A]s there is no issue raising such a question [of exceptions] in this case, such a consideration is more appropriately left to another day.").

47. 538 U.S. 500 (2003).

48. *Massaro*, 538 U.S. at 508 (citing to *Grant*'s language indicating that a claim is not waived if not raised on direct appeal and saying that "[a] growing majority of state courts now follow the rule we adopt today.").

49. *Id.* at 509 ("We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255 [which is the federal habeas corpus statute].").

50. *Id.* at 508.

51. *See, e.g.*, Commonwealth v. Davis, 894 A.2d 151, 153-54 (Pa. Super. Ct. 2006) (dismissing the ineffectiveness claims without prejudice for them to be considered in a post-conviction petition); Commonwealth v. Johnson, 874 A.2d 66, 73-74 (Pa. Super. Ct. 2005) (same), *allocatur denied*, 899 A.2d 1122 (Pa. 2006); Commonwealth v. Ramos-Torres, 855

superior court, however, rightly took the Pennsylvania Supreme Court's equivocal language in *Grant* at face value to mean that it was in fact a general rule with some exceptions.

In the superior court's first opportunity to apply *Grant*, it said that the supreme court "did not announce a complete prohibition on consideration of ineffectiveness claims on direct review."[52] Because of this equivocation, the superior court considered the ineffectiveness argument because the defendant had raised the issue in his Rule 1925(b) statement[53] and the lower court had written an opinion that addressed the issue, which the superior court found to be sufficient for appellate review.[54] Approximately six months later, however, the superior court reached the opposite result in another case where the issue had been raised in the Rule 1925(b) statement and addressed in the trial court opinion, but no record had been created specifically dealing with the ineffectiveness issue.[55] Two months after that, the court found that when an issue is raised in the Rule 1925(b) statement, the trial court addresses the issue in its opinion, and the record is otherwise sufficient (even when a hearing on the ineffectiveness issue was not held), the claim can be considered on appeal.[56] Instead of creating a consistent line of cases, the court made distinctions where none were present.

The superior court found another exception for ineffectiveness arguments in appeals from juvenile adjudications.[57] A delinquent juvenile may not resort to the PCRA for relief because it only applies to adults convicted of a crime.[58] Again harkening back to the

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A.2d 116, 118-20 (Pa. Super. Ct. 2004) (same); Commonwealth v. Causey, 833 A.2d 165, 174-76 (Pa. Super. Ct. 2003) (same), *allocatur denied*, 848 A.2d 927 (Pa. 2004).

52. Commonwealth v. Jette, 818 A.2d 533, 535 n.3 (Pa. Super. Ct. 2003), *allocatur denied*, 833 A.2d 141 (Pa. 2003).

53. Again, pursuant to Rule of Appellate Procedure 1925, an appellant must file a statement that identifies the issues to be raised on appeal. The trial court then writes an opinion addressing these issues. *See supra* note 26.

54. *Jette*, 818 A.2d at 535 n.3. For the Pennsylvania Supreme Court's treatment of this *Grant* exception, see *infra* notes 71-73 and accompanying text.

55. Commonwealth v. Burkett, 830 A.2d 1034, 1037 n.2 (Pa. Super. Ct. 2003). The *Burkett* court distinguished *Jette* by saying that the record in *Jette* did not specify whether the ineffectiveness issue had been properly preserved in a post-sentence motion, so the *Burkett* court was going to "assume" that the issue in *Jette* had been properly preserved. *Burkett*, 830 A.2d at 1037 n.2. *Jette*, however, seems to more clearly point to the opposite conclusion.

56. Commonwealth v. Watson, 835 A.2d 786, 792-93 (Pa. Super. Ct. 2003).

57. *In re* A.J., 829 A.2d 312, 315 n.3 (Pa. Super. Ct. 2003), *allocatur denied*, 842 A.2d 405 (Pa. 2003); *In re* B.S., 831 A.2d 151, 154 (Pa. Super. Ct. 2003).

58. In Interest of A.P., 617 A.2d 764, 768 (Pa. Super. Ct. 1992) (en banc), *aff'd*, 639 A.2d 1181 (Pa. 1994) (per curiam).

indecisive language from *Grant*, the superior court has allowed juvenile appellants to argue prior counsel's ineffectiveness on direct appeal when no other possible way existed to argue that the prior attorney was ineffective.[59]

Finally, the superior court was faced with the conundrum of a criminal defendant with such a short sentence that he or she will have finished it before any relief is possible under the PCRA. This creates a problem because a defendant is eligible for relief under the PCRA only if he or she is "currently serving a sentence of imprisonment, probation or parole for the crime"[60] at the time relief is granted.[61] Consequently, for defendants with sentences so short that their sentence will be completed before a PCRA petition could be litigated, a strict reading of *Grant* requiring deferral would divest these appellants of any opportunity to litigate whether their trial attorney was ineffective.

The fate of short-sentence defendants, however, did not seem to be sealed by the open-ended language in *Grant*. By stating a general rule and by hinting at possible exceptions,[62] the *Grant* court did not appear to be creating "ineffectiveness free zones"[63] in direct appeals.

Because of PCRA ineligibility for short-sentence defendants, the superior court created and repeatedly applied a short-sentence exception to the general deferral rule of *Grant*.[64] Sitting en banc, the court noted that "the strict application of the rule announced in *Grant* is problematic in some instances" such as in cases involv-

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59. *In re A.J.*, 829 A.2d at 315 n.3; *In re B.S.*, 831 A.2d at 154.

60. 42 PA. CONS. STAT. § 9543(a)(1)(i) (1998).

61. Commonwealth v. Ahlborn, 699 A.2d 718, 720 (Pa. 1997).

62. *See supra* notes 18-46 and accompanying text.

63. This term was coined by Professor Bruce A. Antkowiak in *Five Hot Topics: Issues of Pending Concern in Pennsylvania's Appellate Courts*, 42 DUQ. L. REV. 411, 417-18 (2004).

64. *See* Commonwealth v. Salisbury, 823 A.2d 914, 915-16 (Pa. Super. Ct. 2003) (ninety-day sentence), *disapproved of by* Commonwealth v. O'Berg, 880 A.2d 597 (Pa. 2005); Commonwealth v. Ingold, 823 A.2d 917, 919 (Pa. Super. Ct. 2003) (seven-day sentence), *allocatur denied*, 832 A.2d 435 (Pa. 2003), *disapproved of by O'Berg*, 880 A.2d 597; Commonwealth v. Duda, 831 A.2d 728, 732 (Pa. Super. Ct. 2003) (ninety-day sentence); Commonwealth v. Dent, 837 A.2d 571, 587 (Pa. Super. Ct. 2003) (one year of probation served by the time the appeal was decided), *allocatur denied*, 863 A.2d 1143 (Pa. 2004); *but see* Commonwealth v. Millward, 830 A.2d 991 (Pa. Super. Ct. 2003) (declining to apply the short-sentence exception because the defendant still had almost two years of remaining probation within which to litigate a PCRA petition), *allocatur denied*, 848 A.2d 928 (Pa. 2004); Commonwealth v. Blessitt, 852 A.2d 1215, 1218-20 (Pa. Super. Ct. 2004) (en banc) (sixteen to thirty-two month sentence stayed while defendant released on bond pending appeal allowing sufficient time to litigate a post-conviction petition), *disapproved of by O'Berg*, 880 A.2d 597.

ing a short sentence.[65] The first panel to create the short-sentence exception aptly noted that without this exception, those with a short sentence cannot enforce their right to effective assistance of counsel: "Harm is demonstrated by the fact that Appellant will not be able to challenge his constitutional right to effective assistance of counsel because of the length of his sentence."[66] This is what led one commentator to refer to the short-sentence exception as "the easy exception" to *Grant*.[67]

While the superior court has struggled to develop a workable construct after *Grant*, the Pennsylvania Supreme Court has had no problem in clarifying the paradigm for ineffectiveness issues on direct appeal. Despite the equivocal language it used in *Grant*, the supreme court's decisions following *Grant* have cemented a bright-line rule that shifted all undeveloped ineffectiveness arguments to the post-conviction stage.

The post-*Grant* court has repeatedly reaffirmed its preference for ineffectiveness issues to be deferred to the post-conviction stage.[68] The one exception allowed by the court is for ineffectiveness arguments fully litigated in the trial court via a post-sentence motion and a hearing.[69] In *Commonwealth v. Bomar*, the court found that none of the concerns outlined in *Grant* — lack of a hearing, lack of a trial court opinion, distaste for appellate fact-finding, inadequate time for counsel to develop issues — were present here where the ineffectiveness issues were developed in a post-sentence motion, resolved with a hearing and then discussed in a trial court opinion.[70] No reason existed in *Bomar* to not consider fully developed ineffectiveness issues.

Though the *Bomar* exception followed *Grant* by less than six months, as of the publication of this article, no other exceptions have yet been created by the Pennsylvania Supreme Court. To the contrary, *Bomar* reinforced the necessity of *Grant*'s require-

65. *Blessitt*, 852 A.2d at 1219.

66. *Salisbury*, 823 A.2d at 916.

67. Antkowiak, *supra* note 63, at 418 (capitalization modified). Professor Antkowiak wrote that "[w]here direct appeal is the only appeal that is practically possible, the Pennsylvania Superior Court has properly recognized that all issues, including ineffectiveness of trial counsel, must be permitted." *Id.* No doubt because this proposition seemed self-evident, he did not elaborate on *why* the superior court properly created this exception. *See id.*

68. *See, e.g.*, Commonwealth v. Mitchell, 902 A.2d 430, 459 (Pa. 2006); Commonwealth v. Roney, 866 A.2d 351, 356-57 (Pa.2005), *cert. denied*, 126 S. Ct. 139 (2005); Commonwealth v. DeJesus, 860 A.2d 102, 107-08 (Pa. 2004); Commonwealth v. Ramos, 827 A.2d 1195, 1198-99 (Pa. 2003), *cert. denied*, 541 U.S. 940 (2004).

69. Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003).

70. *Bomar*, 826 A.2d at 853-55.

ments instead of chipping away at *Grant*'s foundations. In fact, the supreme court has closed two of the openings the superior court had created to allow ineffectiveness arguments on direct appeal.

In *Commonwealth v. Davido*,[71] the supreme court found that the mere presence of a trial court opinion addressing the ineffectiveness arguments does not merit an exception to *Grant*. In *Davido*, no record had been created on the ineffectiveness issue, but the trial court relied exclusively upon the existing record when writing its opinion.[72] This was insufficient, and the ineffectiveness claim was, thus, deferred to the post-conviction stage.[73]

In August 2005, in *Commonwealth v. O'Berg*,[74] the Pennsylvania Supreme Court further cemented the deferment mandate of *Grant* by disapproving of an exception for those with sentences too short to ever obtain post-conviction relief. This rule effectively eliminates the possibility of litigating ineffectiveness arguments for a class of criminal defendants.

In reaching this result, the court recognized that it said in *Grant* that the new rule should not harm a defendant, but the court nonetheless said "[t]hat concern, however, cannot be used to defeat the reasoning underlying our decision in *Grant*."[75] The *O'Berg* court also chastised the superior court for "focus[ing] on issues of fairness" and for "ignor[ing] whether the trial court [had] reviewed the claim," which it categorized as "the critical inquiry" in an ineffectiveness issue.[76]

The supreme court again highlighted that the driving forces behind *Grant* were the perceived necessity for a lower court opinion, the need for a record, and the fear of an appellate court acting as a

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71. 868 A.2d 431 (Pa. 2005), *cert. denied*, 126 S. Ct. 660 (2005).

72. *Davido*, 868 A.2d at 441 n.16.

73. *Id.* at 441. This overruled the exception created by the Pennsylvania Superior Court in *Commonwealth v. Jette*, 818 A.2d 533, 535 n.3 (Pa. Super. Ct. 2003), *allocatur denied*, 833 A.2d 141 (Pa. 2003), and *Commonwealth v. Watson*, 835 A.2d 786, 792-93 (Pa. Super. Ct. 2003). *See* Commonwealth v. Fitzgerald, 877 A.2d 1273, 1274-75 (Pa. Super. Ct. 2005) (recognizing that the Pennsylvania Supreme Court had tacitly overruled this procedure of relying upon the Rule 1925(b) statement and the trial court opinion to develop an infectiveness issue for direct appeal), *allocatur denied*, 891 A.2d 730 (Pa. 2005), *cert. denied*, 127 S. Ct. 61 (2006). *See supra* notes 52-56 (discussing this superior court exception).

74. 880 A.2d 597 (Pa. 2005).

75. *O'Berg*, 880 A.2d at 601. In *Grant*, the court said that "neither party will be harmed by application of the new rule since claims of ineffectiveness can be raised in a collateral proceeding . . . ." Commonwealth v. Grant, 813 A.2d 726, 739 (Pa. 2002).

76. *O'Berg*, 880 A.2d at 601.

fact finder; it noted that these concerns would remain in a short-sentence scenario and "cannot be ignored."[77]

The court also wrote that it was not capable of devising a test to determine how short a sentence must be to qualify for this exception.[78] Without an appropriate short-sentence test, the court worried that the rule might be applied unfairly to some defendants while leaving others out.[79] This quest for fairness means that all short-sentence defendants, rather than just some of them, will have no forum for vindicating their right to effective assistance of counsel.

The effect of *Grant* and its progeny is that all undeveloped ineffectiveness issues must be deferred to the post-conviction stage. This is true even when there can be no post-conviction stage and the ineffectiveness issues, thus, are impossible to litigate. Defendants in this situation may have been convicted solely because their attorney was constitutionally ineffective, yet they can do nothing about it. The issue then becomes whether this construct is constitutionally permissible.

D. Policy and Constitutional Problems with the Grant *and* O'Berg *Rules*

As a policy matter, despite the salutary reasons for the *Grant* decision given by the Pennsylvania Supreme Court, there are many reasons why the deferment rule is troublesome. Defendants who suffered with a constitutionally ineffective attorney must wait much longer now to receive relief. As bad as this is in general, for an innocent defendant, it means being wrongfully incarcerated for a longer period of time.[80]

Grant also puts some defendants in a position of having to make a nearly impossible choice. They will have to decide whether to pursue a direct appeal, or to forgo it, along with any preserved

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77. *Id.* at 601-02.

78. *Id.* at 602.

79. *Id.* at 602 n.3.

80. *See* Harris et al., *supra* note 15, at 467 ("For the innocent or illegally sentenced defendant, delays exacerbate the miscarriage of justice."); Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1547 (1997) ("Petitioners almost always want a speedy resolution to their claims; in some cases it may mean freedom from their incarceration."); Kirk J. Henderson, *Thanks But No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement*, 51 CASE W. RES. L. REV. 201, 225 (2000) ("prisoners have an interest in receiving relief as quickly as possible"); Rose v. Lundy, 455 U.S. 509, 520 (1982) ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims.").

issues, in favor of raising ineffectiveness arguments in a PCRA petition.[81] Pursuing the direct appeal (without any ineffectiveness arguments) can mean a delay of months or years before an ineffectiveness argument can be litigated.[82] During this delay, evidence can be lost or can become stale.[83] Of course, it also means that an innocent person may sit in jail for a much longer period than would have been necessary before *Grant*.[84]

This has led some commentators to argue with much force and reason that all ineffectiveness issues are more properly resolved during a direct appeal rather than much later (if raising them later is even possible) in a post-conviction petition.[85] Other pro-

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81. For example, consider a defendant with an arguable issue preserved for appeal and a slightly better ineffectiveness issue not preserved for appeal. The defendant would have to decide whether to pursue the direct appeal and wait months and likely years before filing a post-conviction petition or, alternatively, whether to withdraw the appeal and pursue a post-conviction petition with only the ineffectiveness issue. If the defendant chose the latter course, the arguable, preserved issue would be forfeited, but the ineffectiveness issue could be raised much sooner. In the pre-*Grant* construct, the defendant would not be faced with this Hobson's choice, but instead could raise both issues on appeal. For a similar analysis, see Eve L. Brensike, *Structural Reform in Criminal Defense*, 92 CORNELL L. REV. (forthcoming 2007) (manuscript at 27) (positing a hypothetical conversation between a lawyer and client facing this situation). *See also* Thomas M. Place, *Recent Developments in Postconviction Relief*, 74 PA. B. ASS'N Q. 78 (2003) ("If counsel is uncertain whether the defendant will be eligible for PCRA relief at the conclusion of direct appeal and, moreover, believes the undeveloped ineffectiveness claims are stronger than the preserved issues, counsel arguably has an obligation to discuss with the defendant withdrawing the appeal and pursuing postconviction relief.").

82. In *O'Berg*, the court noted that some direct appeals have taken four, five, even up to an unbelievable eleven years to be completed. *O'Berg*, 880 A.2d at 602.

83. Henderson, *supra* note 80, at 226 ("a retrial may become difficult or impossible if a . . . court grants relief in the distant future because memories fade, witnesses disappear, and evidence is lost or destroyed"); *see also* Brensike, *supra* note 81 (manuscript at 15) (in the years for a direct appeal to run its course and before a post-conviction petition may be filed, "crucial witnesses may have died or disappeared. And even if the witnesses are still available, their memories of relevant events may have deteriorated. Physical evidence may have disappeared, spoiled, or have been destroyed in the normal course of business.").

84. *See supra* note 80 and accompanying text. The prosecution also has an interest in litigating the ineffectiveness issues earlier rather than later. Henderson, *supra* note 80, at 225 ("Both the state and the prisoner have an interest in a quicker ultimate resolution of the case."). If a new trial were to be granted, the prosecutor may have a much more difficult time reassembling witnesses and evidence many years in the future. *See* Brensike, *supra* note 81 (manuscript at 16); Henderson, *supra* note 80, at 226. Also, victims and families would have to live through another trial when they may have mentally moved on from the crime. Brensike, *supra* note 81 (manuscript at 16). Perhaps this is why, in *Commonwealth v. Grant*, the Commonwealth and the Attorney General as amicus both favored the then-existing *Dancer/Hubbard* rule. *See* Commonwealth v. Grant, 813 A.2d 726, 740 (Pa. 2002) (Saylor, J., concurring) (quoting Brief for the Attorney General of Pennsylvania as *Amicus Curiae* supporting respondents at 2)); *see also infra* notes 86-87 and accompanying text.

85. Brensike, *supra* note 81 (manuscript at 29-31). Professor Brensike argues that a modified direct appeal procedure would allow for ineffectiveness issues to be raised on direct appeal. Her suggested procedure calls for the appellate attorney to file with the trial

ponents of this view were the strange bedfellows of the parties in *Grant* and the Pennsylvania Attorney General participating as amicus. None of them wanted the change wrought by the Pennsylvania Supreme Court in *Grant*.[86] In its brief, the Attorney General put it this way:

> Any alternative procedures [other than the *Dancer/Hubbard* rule] would delay finality where affirmance of the judgment of sentence is the correct result, would delay the grant of relief where relief is the correct result, and would delay the convening of evidentiary hearings where there is a need to complete a factual record. Any alternative procedures would benefit neither the Commonwealth, the defendant nor the effective administration of justice.[87]

Putting aside these strong policy arguments against the *Grant* approach, *Grant*'s deferment procedure is not per se unconstitutional.[88] Though having to wait, defendants are directed to another forum where they may raise their arguments about whether their attorney's performance met the constitutional standard. While the *Grant* approach arguably is not the best construct for appellate practice, that does not make it unconstitutional.

The Constitution, however, comes into play when no alternative forum is available to litigate an ineffectiveness claim. Defendants with a sentence so short that it does not allow them the time necessary to litigate a post-conviction petition are left with no opportunity to vindicate their right to effective assistance of counsel. The issue then becomes whether a state is required to present a

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court a motion for a new trial when any ineffectiveness issues are present. The time for filing this motion would be at least six months after the trial transcripts are prepared, which would allow sufficient time for extra-record investigation. The trial court then would rule on this motion, and the appeal, if still necessary, would proceed to the appellate court. Any preserved issues would be considered with the ineffectiveness issues. *Id.* This procedure would satisfy the four difficulties that led to the *Grant* decision, i.e., the appellate court would not be ruling on an issue raised for the first time on appeal, the appellate court would not have to consider matters outside of the record or act as a fact finder, the trial court will have supplied the appellate court with an opinion, and appellate counsel will have had a reasonable amount of time to investigate and prepare the argument. *See Grant*, 813 A.2d at 734, 736-37; *see also supra* notes 22-37 and accompanying text (discussing this portion of *Grant*).

86. "[N]either party to this appeal advocates departure from present practice. Further, the view of the Attorney General of Pennsylvania, acting as *amicus curiae*, aligns with that of the parties . . . ." *Grant*, 813 A.2d at 740 (Saylor, J., concurring).

87. *Id.* (Saylor, J., concurring) (quoting Brief for the Attorney General of Pennsylvania as *Amicus Curiae* supporting respondents at 2).

88. *See generally* Massaro v. United States, 538 U.S. 500 (2003) (preferring, though not absolutely requiring, deferment of ineffectiveness claims).

criminal defendant with a forum to enforce the Sixth Amendment right to effective assistance of counsel.

In his concurrence in *O'Berg*, Justice Castille opined that states are not required to provide this opportunity to a defendant with a short sentence. He wrote that "in drafting the PCRA, the General Assembly made a presumptively valid legislative judgment that direct review provides sufficient due process for relatively minor infractions, no matter how grave a defaulted constitutional violation may have occurred."[89] Justice Castille added that he believed a state may lessen its courts' caseloads and the concomitant costs by depriving those with a short sentence of the opportunity to vindicate their right to counsel: "In a world of overburdened courts and overtaxed governmental coffers, it is perfectly rational to deny habeas corpus/collateral claim review to petitioners whose 'bodies' the state no longer 'has' — even if it means they lose the chance to raise any and all complaints they may have about their trial lawyers."[90] Justice Castille believes that "[t]here is nothing unreasonable, unwise, or unconstitutional with such a construct."[91]

Federal constitutional law, however, suggests that Justice Castille's pronouncement is incorrect. Whether or not depriving defendants of the opportunity to vindicate their right to counsel is reasonable or wise, it is unconstitutional.

Despite the *O'Berg* ruling, that case was not the final word on a short-sentence exception to *Grant*. The *O'Berg* court, while failing to create a short-sentence exception, did so on state-law grounds, merely declining to change the general holding of a precedent.[92] It

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89. Commonwealth v. O'Berg, 880 A.2d 597, 603 (Pa. 2005) (Castille, J., concurring). He continued by saying that:

> [t]he General Assembly must have foreseen that, because of the minor nature of some crimes or the brevity of some sentences, certain defendants would not be entitled to seek collateral review at all. The General Assembly also must have foreseen that its custody or control restriction would effectively preclude "short sentence" defendants from pursuing collateral claims, such as ineffective assistance of counsel.

O'Berg, 880 A.2d at 603. Justice Castille failed to note, however, that when the Legislature created the PCRA and its predecessor, ineffectiveness claims could have been raised on direct appeal. Under the construct the Legislature created at the time, all defendants had an opportunity to litigate Sixth Amendment violations.

90. *Id.* at 604. Justice Castille's concerns for the "overburdened courts and overtaxed governmental coffers" is contrary to the intent of the Framers of the Pennsylvania constitutional right to appeal. *See infra* note 113 and accompanying text.

91. *Id.*

92. *Id.* at 607. (Saylor, J., dissenting). This was Justice Saylor's take on the majority *O'Berg* opinion. *Id.* (Because the *O'Berg* court considered neither the federal due process clause nor the state right to appeal, that case "represents a more straightforward, error-

did not consider the role of the federal constitutional rights to counsel and to due process.[93] The court also did not consider the impact of the state constitutional right to an appeal.[94] Viewed through these lenses, the *O'Berg* decision is wrong. Pennsylvania must allow an outlet for defendants with short sentences to argue that they were deprived of their constitutional right to the effective assistance of counsel.

III. THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHICH IS A DEFENDANT'S MOST IMPORTANT RIGHT AND WHICH IS ESSENTIAL TO A FAIR TRIAL

The starting point in examining the necessity for a short-sentence exception is recognizing why the right to counsel is the keystone right enjoyed by a criminal defendant and why a defendant, thus, must be given an opportunity to vindicate the deprivation of that right. The reason that a defendant must be afforded a forum to litigate ineffectiveness issues is because the right to counsel guaranteed by the Sixth Amendment to the United States Constitution[95] and by article I, section 9 of the Pennsylvania Constitution[96] is the most important right that a criminal defendant enjoys. The United States Supreme Court recognized that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[97] The Court has repeated this bedrock principle many times over the past four decades.[98]

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review case in which some of the most problematic aspects of the application of *Grant* in the short-sentence paradigm lie beyond the available scope of our review.").

93. *Id.* at 599 n.2 (Because O'Berg first raised a due process argument in his reply brief to the supreme court, that issue was waived and, thus, not considered by the court.).

94. *O'Berg*, 880 A.2d at 607 (Saylor, J., dissenting) ("perhaps it can be said that any claim under Article V, Section 9's guarantee of the right to a direct appeal is also waived here, since Appellant does not specifically invoke that constitutional provision.").

95. In relevant part, the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. This right has been extended to the states through the Fourteenth Amendment's Due Process Clause. Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

96. The pertinent portion of article I, section 9 of the Pennsylvania Constitution requires that "[i]n all criminal prosecutions the accused hath a right to be heard by himself and his counsel." PA. CONST. art. I, § 9.

97. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

98. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 540 (1965) (the Court has categorized the criminal defendant's right to assistance of counsel as "the most fundamental of all freedoms."); Lakeside v. Oregon, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."); Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (the right to counsel is a fundamental

The right to an attorney is so important because "[w]ithout counsel, the right to a trial itself would be 'of little avail.'"[99] Ultimately, what is at stake with the right to counsel is a defendant's right to a fair trial.[100] More than just requiring that the accused has secured a warm body in possession of a law license, the right to counsel encompasses effective representation throughout the case.[101]

In numerous cases, the Court has made clear that a fair trial likely will not occur if counsel is ineffective. "Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'"[102] Likewise, the absence of effective counsel undermines "the ultimate objective that the guilty be convicted and the innocent go free."[103] In other words, confidence that the defendant has received a fair trial and been rightly convicted evaporates when counsel is ineffective.[104]

The importance of the right to counsel was eloquently set forth by the United States Supreme Court in the landmark case of *Powell v. Alabama*[105] nearly three-quarters of a century ago:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is in-

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right which "assures the fairness, and thus the legitimacy, of our adversary process." (citing *Gideon*, 372 U.S. at 344)); *see also* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 36 (1991) ("The Sixth Amendment occupies a pivotal role in the panoply of rights accorded criminal defendants through the Bill of Rights. This distinction flows from the amendment's prescriptive, symbolic and practical value to the adversary system of adjudication. The amendment fosters and promotes the functional and normative purpose of affording a criminal defendant a fair trial." (footnotes omitted)).

99. *Cronic*, 466 U.S. at 653 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

100. Strickland v. Washington, 466 U.S. 668, 684 (1984). ("the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial").

101. *Strickland*, 466 U.S. at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

102. *Cronic*, 466 U.S. at 656 (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

103. Herring v. New York, 422 U.S. 853, 862 (1975); *see also* Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

104. *Cronic*, 466 U.S. at 658 ("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"); *Strickland*, 466 U.S. at 685 ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

105. 287 U.S. 45 (1932).

> capable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[106]

A defendant must be given some way to enforce this critical right, the right by which the adversary system measures whether a trial is fair. Over two centuries ago in *Marbury v. Madison*, the United States Supreme Court made clear that a remedy must be available when a right has been violated; "where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." [107] This means that a criminal defendant must be provided with a forum to demonstrate that his or her trial counsel was ineffective and that the trial, thus, was fundamentally unfair.

IV. THE PENNSYLVANIA CONSTITUTION GUARANTEES ALL DEFENDANTS THE RIGHT TO APPEAL REGARDLESS OF THE SENTENCE OR THE CHARGES

In Pennsylvania, a criminal defendant enjoys the state constitutional right to an appeal through article V, section 9 of the Pennsylvania Constitution. Under article V, section 9, "there shall be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court."[108] This is an

106. *Powell*, 287 U.S. at 68-69.
107. 5 U.S. (1 Cranch) 137, 163 (1803).
108. PA. CONST. art. V, § 9.

"absolute right"[109] that extends to "[e]very person convicted of a crime."[110] Furthermore, the guarantee of this constitutional right "is now settled beyond argument."[111]

When article V, section 9 was being drafted and debated during the Constitutional Convention of 1968, the Framers were concerned that some aggrieved litigants were being deprived of an opportunity to have a court on appeal decide their case on the merits.[112] Because they believed the right to appeal was fundamental, the Framers were unconcerned about what effect this newly-guaranteed right might have on the caseloads of the Commonwealth's appellate courts.[113] The final result, which passed by a vote of 128 to 2, was that the Framers intended to guarantee to all the right of appeal that could not be limited by legislative action or judicial decision.[114] One commentator has stated:

> It is clear from the plain language of the provision, the related historical background, and the debates at the Constitutional Convention of 1968 that the Framers intended to provide a fundamental right of review on the merits to every litigant in Pennsylvania. This right could not be limited or interfered with by the legislature or the courts . . . .[115]

The rule in *O'Berg* deprives defendants who received a short sentence and who want to argue the ineffectiveness of their trial counsel of any opportunity to exercise their constitutional right to appeal. Article V, section 9, however, was intended to prevent such judicial encroachment upon the right to appeal.[116]

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109. Commonwealth v. Wilkerson, 416 A.2d 477, 479 (Pa. 1980) (citing PA. CONST. art. V, § 9).

110. Commonwealth v. Maloy, 264 A.2d 697, 698 (Pa. 1970).

111. *Maloy*, 264 A.2d at 698. Numerous cases from the superior court also have discussed the right to appeal. *See, e.g.*, Commonwealth v. Bronaugh, 670 A.2d 147, 149 (Pa. Super. Ct. 1995) ("In Pennsylvania, an accused has an absolute right to a direct appeal." (citing PA. CONST. art. V, § 9)); Commonwealth v. McKnight, 457 A.2d 1272, 1275 (Pa. Super. Ct. 1983) ("an accused has an absolute right to an appeal" (citing PA. CONST. art. V, § 9)).

112. Leonard Sosnov, *Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future*, 3 WIDENER J. PUB. L. 217, 329-32 (1993).

113. *Id.* at 332.

114. *Id.* at 332-33 and n.547.

115. *Id.* at 332 (footnote omitted).

116. *See also* Commonwealth v. Castillo, 888 A.2d 775, 781 (Pa. 2005) (Saylor, J., dissenting) ("I believe that reflexive displacement of appeals, in whole or in part, based on factors outside the litigants' direct control is in substantial tension with the right to direct appellate review conferred by the Pennsylvania Constitution." (citing PA. CONST. art. V, § 9)).

Some means of appeal must be afforded to those criminal defendants with short sentences to argue that they were deprived of effective assistance of counsel at trial. For short-sentence defendants to be able to realize their constitutional right to appeal, either they must be allowed to raise ineffectiveness issues on direct appeal or they must be permitted to raise them under the PCRA, even if they already have completed their sentences.

V. ONCE THE RIGHT TO AN APPEAL HAS BEEN GRANTED, IT MUST BE CONDUCTED CONSISTENT WITH DUE PROCESS, WHICH MEANS THAT IT MUST BE A MEANINGFUL APPEAL THAT PROVIDES AN ADEQUATE OPPORTUNITY TO LITIGATE THE ISSUES

During the course of the twentieth century and continuing today, the United States Supreme Court has made it clear that a state's appellate process must be administered in accord with due process principles. This line of cases leads to the conclusion that a state, consistent with due process, may not eliminate the right of a class of criminal defendants to raise a claim that they were deprived of the constitutional right to effective assistance of counsel.

At the close of the nineteenth century, the United States Supreme Court held that a state is not required to provide an appeal to a criminal conviction.[117] This remains the law today,[118] though its vitality has been questioned.[119] Even though an appeal is not constitutionally mandated, however, the Court has said that once an appeal is offered (as the Pennsylvania Constitution guarantees in article V, section 9), the state is restricted in efforts to limit an appeal.

In *Griffin v. Illinois*,[120] the Court tackled the question of whether a state may condition an appeal upon the purchase of a

117. McKane v. Durston, 153 U.S. 684, 687 (1894).

118. *See, e.g.*, Halbert v. Michigan, 125 S. Ct. 2582, 2586 (2005).

119. *See* Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting). There, Justice Brennan stated:

> [i]f the question were to come before us in a proper case, I have little doubt that . . . we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

Jones, 463 U.S. at 756 n.1 (Brennan, J., dissenting).

120. 351 U.S. 12 (1956).

transcript that an indigent defendant cannot afford. The Court noted that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence."[121] The Court also recognized that appellate review in Illinois (as in Pennsylvania under article V, section 9) was "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant."[122] Relying primarily upon equal protection grounds, the *Griffin* Court held that access to an appeal cannot be conditioned upon a defendant's ability to pay some cost.[123]

In addition to these equal protection concerns, however, the Court noted that the transcript is necessary to ensure an "adequate and effective" appeal.[124] In other words, the Court was not concerned just with the disparity in rich versus poor defendants, but also with ensuring that the defendant had the capacity to make this appeal "adequate and effective." In this sense, the Due Process Clause was also important to this decision's principle.[125]

Seven years later, on the same day the Court decided *Gideon v. Wainwright*,[126] it issued its opinion in *Douglas v. California*.[127] The Court held that a state may not deprive an indigent defendant of the assistance of counsel in a first appeal as of right.[128]

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121. *Griffin*, 351 U.S. at 18.

122. *Id.* Not only is the right to appeal recognized in the Pennsylvania Constitution, but it also can be found in the Rules of Appellate Procedure, PA. R. APP. P. 341 ("an appeal may be taken as of right from any final order of an administrative agency or lower court"), in the Judicial Code, 42 PA. CONS. STAT. § 5105(a)(1) ("Right to appellate review: There is a right of appeal under this subsection from the final order (including an order defined as a final order by general rule) of every: . . . Court or magisterial district judge of this Commonwealth to the court having jurisdiction of such appeals."), and, in case law, as noted above in notes 109-11 and accompanying text. To borrow *Griffin*'s language, Pennsylvania, thus, has "recognize[ed] the importance of appellate review to a correct adjudication of guilt or innocence" and has made it an "integral part" of the scheme that determines guilt or innocence. *Griffin*, 351 U.S. at 18.

123. *Griffin*, 351 U.S. at 19.

124. *Id.* at 20.

125. The Court observed that the issue presented to it argued a denial of due process as well as equal protection. *Id.* at 13. The Court also noted that "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.* at 17.

126. 372 U.S. 335, 344-45 (1963) (in *Gideon*, the Court held that an indigent defendant in a state-court criminal prosecution has the right to have counsel appointed to represent him or her).

127. 372 U.S. 353 (1963).

128. *Douglas*, 372 U.S. at 358. The procedure being reviewed in *Douglas* involved an appraisal of the record by an appellate court to determine whether appointment of counsel "would be helpful to the defendant or the court." If the court believed not, it should not appoint counsel for the appeal. *Id.* at 354-55.

Again, the primary impetus for this decision was an equal protection concern, but due process notions also provided support for the holding.[129] In that vein, the Court noted that an unrepresented indigent's appeal would be nothing more than a "meaningless ritual."[130] Furthermore, "the right to appeal [without the appointment of counsel to indigents] does not comport with fair procedure."[131] These sentiments reflect concerns that appeals must be conducted consistent with the Due Process Clause.

The Court declined to extend the reach of *Douglas* to discretionary appeals to state supreme courts in *Ross v. Moffitt*.[132] As noted above, the Court in *Griffin* characterized the appeal as being a continuation of the adjudication of guilt or innocence.[133] The *Ross* Court, however, focused upon what it perceived to be "significant differences between the trial and appellate stages of a criminal proceeding."[134] The Court said, "[t]he purpose of the trial stage

129. *See id.* at 360-61 (Harlan, J., dissenting) ("the Court appears to rely both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on 'equal protection'"). The United States Supreme Court has noted that a precise rationale for *Griffin*, *Douglas*, and their progeny has not been explicitly stated: "A 'precise rationale' has not been composed . . . because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.'" M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (quoting Ross v. Moffitt, 417 U.S. 600, 608 (1974) and Bearden v. Georgia, 461 U.S. 660, 666 (1983)). The Court, however, has often commented upon how due process concepts underpinned both *Griffin* and *Douglas*. *See Ross*, 417 U.S. at 608-09 ("The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *Bearden*, 461 U.S. at 665 ("Due process and equal protection principles converge in the Court's analysis in these cases"); Jones v. Barnes, 463 U.S. 745, 756-57 (1983) (Brennan, J., dissenting) ("In recognizing the right to counsel on appeal, we have expressly relied not only on the Fourteenth Amendment's Equal Protection clause, which in this context prohibits disadvantaging indigent defendants in comparison to those who can afford to hire counsel themselves, but also on its Due Process Clause and its incorporation of Sixth Amendment standards."); Evitts v. Lucey, 469 U.S. 387, 405 n.12 (1985) (after noting that the Court in *Ross* analyzed the issue primarily in terms of equal protection, the Court pointed out that "neither *Ross* nor any of the other cases in the *Griffin* line ever rejected the proposition that the Due Process Clause exerted a significant influence on our analysis in this area."); *M.L.B.*, 519 U.S. at 110 ("the *Griffin* plurality drew support from the Due Process and Equal Protection Clauses").

130. *Douglas*, 372 U.S. at 358. *See* Brensike, *supra* note 81 (manuscript at 44). Professor Brensike notes that, interestingly, the Court realized that the appeal for an unrepresented indigent may be a "meaningless ritual" "where the record is unclear or the errors are hidden." *Id.* (quoting *Douglas*, 372 U.S. at 358). This begs the question of what errors could be unclear or hidden except ineffectiveness issues. If the attorney has objected and preserved the issue for appeal, it is neither unclear nor hidden; to the contrary, it is an obvious potential appellate issue. This language from *Douglas*, thus, seems to suggest that ineffectiveness issues may sometimes be necessary for a meaningful appeal.

131. *Douglas*, 372 U.S. at 357.

132. 417 U.S. 600, 610-11 (1974).

133. *Griffin*, 351 U.S. at 18.

134. *Ross*, 417 U.S. at 610.

from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt."[135] On the other hand, "[b]y contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below."[136] This difference, however, should not affect the question of whether a state may bar a defendant from ever seeking to vindicate his right to constitutionally effective *trial* counsel.

The *Ross* Court restated the critical importance of trial counsel: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[137] It is this quest for a fair trial ensured by counsel that is at stake for short-sentence defendants. This is not inconsistent with the holding in *Ross* that counsel is not constitutionally required to file discretionary appeals to a supreme court. What was central to the holding in *Ross* was that the defendant had already been given one counseled appeal as of right to the intermediate appellate court.[138] A short-sentence defendant with an ineffectiveness issue, on the other hand, is prohibited from ever having a court review his or her only issue, which sets forth how the trial attorney was constitutionally ineffective. Though limiting the right to counsel to a first appeal as of right, the *Ross* Court still recognized the importance of access to that appeal: "[t]he duty of the State under our cases is . . . to assure the indigent defendant an *adequate opportunity* to present his claims fairly in the context of the State's appellate process."[139] Due process principles therefore entitle short-sentence defendants to an opportunity to present ineffectiveness claims to an appellate court.

In *Evitts v. Lucey*,[140] the United States Supreme Court extended *Douglas*'s right to counsel on appeal for indigents to the right for all defendants to enjoy constitutionally effective counsel on appeal.

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135. *Id.*
136. *Id.*
137. *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).
138. *Id.* at 615 ("At that stage [of discretionary supreme court review], he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case.").
139. *Ross*, 417 U.S. at 616 (emphasis added).
140. 469 U.S. 387, 396 (1985).

In reaching this decision, the Court explicitly held that appeals must be conducted under the auspices of the Due Process Clause. "In short, when a State opts to act in a field where its action has significant discretionary elements [such as deciding direct appeals], it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause."[141] Specifically, the Due Process Clause requires a state that has provided an appeal of a conviction "to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."[142]

The Court later reaffirmed the requirements that the state must afford a defendant with the opportunity to present his or her claims on appeal and those claims must be decided on their merits. In *Ake v. Oklahoma*,[143] the Court held that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'"[144] More recently, Justice Thomas wrote for the Court that a state's procedure must "'affor[d] adequate and effective appellate review to indigent defendants' . . . [and] [a] State's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal."[145]

If all of these cases were charted on a Venn diagram, the intersecting areas would show that once a state offers an appeal, it must conduct that appeal consistent with due process. This means that the state must provide a meaningful appeal, one with an adequate opportunity to litigate the issues in the appeal to at least one appellate court. For a criminal defendant with a short sentence, that means that the due process rights that have attached to the defendant's constitutional right to appeal also protect the right to have any ineffectiveness issues decided on the merits by an appellate court. The rule in *O'Berg* in conjunction with the currently serving requirement of the PCRA cannot defeat this constitutional right.

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141. *Evitts*, 469 U.S. at 401.
142. *Id.* at 405.
143. 470 U.S. 68, 77 (1985).
144. *Ake*, 470 U.S. at 77 (quoting *Ross*, 417 U.S. at 612).
145. Smith v. Robbins, 528 U.S. 259, 276-77 (2000) (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)).

VI. DUE PROCESS GUARANTEES APPLY ON APPEAL TO ALL DEFENDANTS, REGARDLESS OF THE LENGTH OF THEIR SENTENCES AND WHETHER THEY ARE CHARGED WITH MISDEMEANORS OR FELONIES

In his *O'Berg* concurrence, which no other member of the Pennsylvania Supreme Court joined, Justice Castille wrote that "[w]ith respect to 'short-sentence' cases, in drafting the PCRA, the General Assembly made a presumptively valid legislative judgment that direct review provides sufficient due process for relatively minor infractions, no matter how grave a defaulted constitutional violation may have occurred."[146] This analysis, however, is insensitive to the constitutional due process principles outlined above. Contrary to Justice Castille's claim, these due process concerns do not evaporate in cases in which the sentence is short or calls for no jail time at all.

In *Mayer v. Chicago*,[147] the United States Supreme Court ruled that an indigent who received no jail sentence was still entitled to a free transcript. The Court recognized that incarceration is not the touchstone by which a right to a meaningful appeal is measured.[148] The *Mayer* Court stated:

> The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.[149]

As this case flows from the *Griffin* line of cases, due process along with equal protection considerations prohibit the state from refusing a transcript even when no jail time is imposed; otherwise, the defendant is deprived of an appeal.

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146. Commonwealth v. O'Berg, 880 A.2d 597, 603 (Pa. 2005) (Castille, J., concurring).
147. 404 U.S. 189 (1971).
148. *Mayer*, 404 U.S. at 197.
149. *Id.* The Court also pointed out that states run the risk of alienating its citizenry by denying them access to appellate courts. *Id.* "Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice." *Id.* at 197-98.

In his concurrence in *Argersinger v. Hamlin*,[150] Justice Powell pointed out that "[s]erious consequences also may result from convictions not punishable by imprisonment."[151] He listed some of the consequences of a conviction irrespective of jail time: loss of a driver's license, forfeiture of public office, disqualification for a licensed profession, and a loss of pension benefits.[152] Furthermore, in *Evitts v. Lucey*, the Court went so far as to say that "some collateral consequences of his conviction remain" because "he had not been pardoned."[153]

With this history, the Court, not surprisingly, held in an opinion by Justice Scalia in *Spencer v. Kemna* that "it is an 'obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.'"[154] Along these lines, the Court noted that "[i]n recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur)."[155]

Likewise, the United States Supreme Court noted in *M.L.B. v. S.L.J.*[156] that it "declined to limit *Griffin* to cases in which the defendant faced incarceration."[157] The *M.L.B.* Court also recounted what it said in *Mayer* that "[p]etty offenses could entail serious collateral consequences."[158] Drawing upon these principles, the Court in *M.L.B.* extended *Griffin* to prevent a state from blocking appellate review of a finding terminating parental rights to one unable to pay appellate costs.[159] This is significant for any criminal defendant with a short sentence, including one with no jail time at all, because, obviously, no jail time was involved in the *M.L.B.* case. Instead, what was important was that the mother

150. 407 U.S. 25 (1972).
151. *Argersinger*, 407 U.S. at 48 (Powell, J., concurring).
152. *Id.* at 48 n.11.
153. Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985).
154. Spencer v. Kemna, 523 U.S. 1, 12 (1998) (quoting Sibron v. New York, 392 U.S. 40, 55 (1968)). The holding in *Spencer* reaffirmed that presumed collateral consequences of a conviction, even if the sentence has been served, provide enough of a continuing injury to maintain a federal habeas corpus action. *Spencer*, 523 U.S. at 7-12.
155. *Id.* at 8 (citing *Sibron*, 392 U.S. at 55-56); *see also* Lane v. Williams, 455 U.S. 624, 634 (1982) (Marshall, J., dissenting) (noting that the United States Supreme Court "has consistently refused to canvass state law to ascertain 'the actual existence of specific collateral consequences,' and has presumed that such consequences exist" (quoting *Sibron*, 392 U.S. at 55)).
156. 519 U.S. 102, 112 (1996).
157. *M.L.B.*, 519 U.S. at 112.
158. *Id.*
159. *Id.* at 128.

had an opportunity on appeal to challenge the sufficiency of the lower court's termination of her parental rights. Following this principle, all short-sentence defendants should also have an opportunity on appeal to argue that the trial attorney was ineffective.

In addition to the Court's recognition that constitutional protections continue to apply in short-sentence cases, the Court also has frowned upon rules that prevent a criminal defendant from exercising a constitutional right because of the minor nature of the charges. In *Groppi v. Wisconsin*,[160] the defendant was charged with the misdemeanor offense of resisting arrest. In a case that received a great deal of local media attention (the defendant was a Roman Catholic priest involved in a protest), the trial court ruled that Wisconsin law forbade a change of venue for misdemeanor prosecutions.[161] As the Court said, "[t]he question before us, therefore, goes to the constitutionality of a state law that categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against him is labeled a misdemeanor."[162] The Constitution, of course, includes a right to a fair trial by an impartial jury.[163]

That right does not evaporate merely because the defendant is faced with a less serious charge that carries a possibility of little or no jail time. The Court held that the Constitution requires that a defendant must be given the opportunity to argue this issue and a rule that categorically denies that right to one charged with a misdemeanor was unconstitutional.[164] As Justice Blackmun said in his concurrence, "unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated."[165]

The *O'Berg* rule wholly denies to one with a short sentence the opportunity to show that he or she was deprived of the constitutional guarantee of effective assistance of counsel. The holding in *Groppi*, though involving a different constitutional right, still

160. 400 U.S. 505 (1971).
161. *Groppi*, 400 U.S. at 506.
162. *Id.* at 507-08.
163. *Id.* at 509-10.
164. *Id.* at 511 ("[U]nder the Constitution a defendant must be given an opportunity to show that a change of venue is required in his case. The Wisconsin statute wholly denied that opportunity to the appellant [accused of a misdemeanor].").
165. *Id.* at 514 (Blackmun, J., concurring).

should control the comparable situation of a defendant with a short sentence who suffered ineffective assistance of counsel.

In sum, several principles from these cases apply to the short-sentence defendant. First, the lack of a current sentence of supervision (incarceration, probation, or parole) does not mean that the defendant is unharmed by the conviction. As a matter of federal constitutional law, collateral consequences are presumed to follow a criminal conviction. Second, because of these lingering consequences, a defendant maintains his or her due process rights to have a meaningful appeal that offers an adequate opportunity to litigate the issues. Third, constitutional rights apply to misdemeanants as well as felons and do not disappear when a person is charged with a less serious crime. Therefore, the fact that a defendant has received a short sentence does not extinguish the defendant's constitutional rights in his or her appeal to argue trial counsel's ineffectiveness.

The net result of the United States Supreme Court's case law is that a defendant has a constitutional right to argue that his or her trial attorney was constitutionally ineffective. This is true for all defendants, those with long sentences as well as those with short sentences. *Grant*, *O'Berg*, and the Post-Conviction Relief Act are unconstitutional to the extent that they deprive any defendant of this constitutional right to argue trial counsel's ineffectiveness. The question then remains about how this right can be restored to short-sentence defendants in Pennsylvania.

VII. Ways That Short-Sentence Defendants Could Raise Ineffectiveness Issues

Because a state cannot eliminate all opportunity for a defendant to vindicate the right to effective assistance of counsel, the effect of *O'Berg* and the PCRA's currently serving requirement is to create an unconstitutional condition in which short-sentence defendants are deprived of their constitutional right to adjudicate ineffectiveness issues. To rectify this situation and to allow these defendants to pursue these constitutional claims, Pennsylvania has several options.

A. *Allow, but Not Require, Ineffectiveness Claims to Be Raised on Direct Appeal*

First, the Pennsylvania Supreme Court can reverse the strict course mapped out by the cases following *Grant* and return to the more permissive language in *Grant*.[166] It could revisit the language from *Grant* that announced a "general rule" that a defendant "should wait" until the collateral stage to raise ineffectiveness claims.[167] Because *Grant* overruled *Hubbard* "to the extent that it requires that trial counsel's ineffectiveness be raised" at the first available opportunity, the court could find that *Grant* only means that ineffectiveness claims can be — but need not be — raised on direct appeal. This is consistent, at least in the broad sense, with federal practice after *Massaro v. United States* in 2003.[168]

This would give the defendant the option of raising an ineffectiveness claim on direct appeal or waiting for the post-conviction stage. For gaps in the record, the appellate court could remand to the lower court for a hearing when the defendant has presented an issue with arguable merit and demonstrated that he or she has been prejudiced. This was the *Dancer/Hubbard* solution that worked well for three decades.[169] Justice Saylor suggested that this procedure eliminated all of the problems identified by the

166. To do this, the court would not necessarily have to say that *O'Berg* was wrongly decided. Instead, it could rule on the constitutional grounds that were not presented in *O'Berg*. *See supra* notes 92-94 and accompanying text.

167. Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002).

168. 538 U.S. 500 (2003); *see supra* notes 47-50 and accompanying text.

169. *See supra* notes 8-13 and accompanying text (discussing *Dancer* and *Hubbard*).

Grant majority.[170] Several other jurisdictions still employ this approach.[171]

This procedure, still familiar to judges and attorneys, would solve the constitutional conundrum caused by *O'Berg*. Clearly, however, the Pennsylvania Supreme Court does not favor a return to this construct. *Bomar*, *Davido*, *O'Berg*, and the rest of the supreme court's *Grant* line of cases make this clear. Other possibilities exist that still would preserve the basic deferral scheme of *Grant* while still allowing short-sentence defendants to raise ineffectiveness issues.

B. Allow a Short-Sentence Exception to Grant

Second, the court could, as a constitutional matter, create a short-sentence exception to *Grant*. Under this framework, a defendant with a long sentence who would have the time to litigate ineffectiveness issues in a post-conviction proceeding would be forced to defer the claims until then. Defendants with a sentence too short for this would be given the option to raise their ineffectiveness issues on direct appeal. If the court determined that the issue was one with arguable merit, but more evidence was necessary to determine whether counsel had a reasonable basis or whether the defendant had been prejudiced, the case could be remanded to the trial court for a hearing. In other words, for those defendants with a short sentence, the procedure would return to the pre-*Grant* regimen.

The problem with this approach is determining how short a sentence must be to allow a defendant to proceed with the ineffective-

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170. *Grant*, 813 A.2d at 739-40 (Saylor, J., concurring). Justice Saylor said it this way:

> When properly implemented, the remand procedure ameliorates most of the difficulties that the majority associates with the *Hubbard* rule: the tension between the rule against raising matters for the first time on direct appeal and the requirement that claims of ineffective assistance must be raised at the first available opportunity is lessened, since the matter can be returned to the common pleas court for disposition in the first instance; the specter of the appellate court engaging in factfinding is removed; and the remand will generally put the matter back before the trial judge, who, as the majority observes, is in the best position to review the ineffectiveness claims in the first instance. The concern regarding providing substitute counsel on direct appeal with sufficient time to fully and fairly complete the necessary review of potential claims could be addressed through procedures more modest than a revamping of the review process, and potentially foreclosing the vindication of substantive rights at the earliest opportunity.

Id.

171. *See* Brensike, *supra* note 81 (manuscript at 32 and n.128) (listing, for example, the District of Columbia, Iowa, Kansas, Oklahoma, Utah, and Wyoming).

ness issue on direct appeal. This was a major reason for the *O'Berg* majority to reject the short-sentence exception.[172]

Prior to *O'Berg*, the superior court found sentences ranging from seven days to one year to be sufficiently short to allow an exception.[173] It also found that a sentence with less than nineteen months remaining to be served provided sufficient time to litigate a post-conviction petition without the need for an exception.[174]

As the *O'Berg* court feared, a definition of a "short sentence" appropriate for all defendants is virtually impossible to devise. This is because of the wide variance in the amount of time it takes to litigate a direct appeal and a post-conviction petition. As the *O'Berg* majority noted, direct appeals have taken up to eleven years to complete.[175] Designating eleven years to be a "short sentence" would make that definition meaningless. A very large percentage of all cases would be "short sentences."

Perhaps an even greater concern, however, is the length of time that it takes to litigate a post-conviction petition in Pennsylvania. This is a problem because the defendant must be serving a sentence of incarceration, probation, or parole at the time of the final adjudication of the proceeding.[176] If the defendant is not serving a sentence at that time, no relief may be granted.[177] In other words, before expiration of the sentence, the defendant must have had

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172. Commonwealth v. O'Berg, 880 A.2d 597, 602 (Pa. 2005) ("the concept of a 'short sentence' exception is too ambiguous to give the lower courts any guidance on what is a sufficiently 'short sentence' to apply the exception").

173. *See supra* note 64 (listing all of the reported cases).

174. Commonwealth v. Ostrosky, 866 A.2d 423, 432 (Pa. Super. Ct. 2005) (Popovich, J., concurring and dissenting), *allocatur granted*, 878 A.2d 863 (Pa. 2005); *see also* Commonwealth v. Millward, 830 A.2d 991 (Pa. Super. Ct. 2003), *allocatur denied*, 848 A.2d 928 (Pa. 2004) (two years of remaining sentence was sufficient).

175. *O'Berg*, 880 A.2d at 602 (citing Commonwealth v. Douglas, 645 A.2d 226, 226 (Pa. 1994) (direct appeal lasting more than 11 years); Commonwealth v. Schaeffer, 688 A.2d 1143 (Pa. 1993) (direct appeal lasting at least 5 years); Commonwealth v. McMullen, 681 A.2d 717 (Pa. 1996) (same)). These cases cited by the *O'Berg* court are just some of the reported cases from the supreme court. With the large number of unreported cases in Pennsylvania, the exact dimensions of this problem are unknown. *See also* Brensike, *supra* note 81 (manuscript at 13) (chronicling this problem); Brook Dooley, *Thirty-First Annual Review of Criminal Procedure: Speedy Trials*, 90 Geo. L.J. 1454, 1477 n.1158 (2002) (collecting cases involving delays in appeals ranging from two to thirteen years in length).

176. 42 PA. CONS. STAT. § 9543(a)(1)(i) (1998). That portion of the PCRA says that "[t]o be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following: (1) [t]hat the petitioner has been convicted of a crime under the laws of this Commonwealth and is: (i) currently serving a sentence of imprisonment, probation or parole for the crime." 42 PA. CONS. STAT. § 9543(a)(1)(i).

177. Commonwealth v. Ahlborn, 699 A.2d 718, 720 (Pa. 1997) ("To be eligible for relief a petitioner must be *currently* serving a sentence of imprisonment, probation or parole. To grant relief at a time when appellant is *not* currently serving such a sentence would be to ignore the language of the [PCRA] statute.").

the opportunity to conduct proceedings in the trial court and, if necessary, on appeal, potentially all the way to the Pennsylvania Supreme Court. This process often will be measured in years, not months.

In a 2003 groundbreaking study,[178] the time to litigate a PCRA petition in Pennsylvania's trial courts (excluding the additional time required to litigate any appeals from lower court rulings) was often more than two years.[179] One out of three post-conviction cases statewide was pending in the trial court more than one year, and one out of five cases was pending more than two years.[180] The analysis revealed that "[a]cross Pennsylvania, it is not unusual to find PCRA cases that have been pending for two, three, or even four years."[181] In the wake of *Grant*, the superior court declined to apply its short-sentence exception to one case with just over eighteen months of remaining sentence[182] and to another case with two years of remaining sentence in which to litigate a post-conviction petition.[183] Given these findings on post-conviction delay, those decisions were incorrect because those defendants easily may not have had sufficient time to litigate a post-conviction petition.

Assuming that a defendant is denied post-conviction relief in the trial court,[184] he or she then would have to appeal the case, which the *O'Berg* court noted sometimes can take five years or more.[185] If at any point during this process the defendant has finished serving the sentence, the petition must be dismissed.[186] Therefore, any solution must account for this long delay that can prevent short-sentence defendants from obtaining relief.

Prior to *O'Berg*, the superior court found that just over eighteen months of remaining sentence was sufficient time to litigate a

178. Harris et al., *supra* note 15, at 467 ("This article reports on decision times in trial court proceedings for collateral relief, and is the first study of its kind.").

179. *Id.* at 477, 492.

180. *Id.* at 477.

181. *Id.* at 477, 492. The authors also noted that "the norms and culture of post conviction delay are both deeply rooted and widespread in the Commonwealth." *Id.* at 492.

182. Commonwealth v. Ostrosky, 866 A.2d 423, 432 (Pa. Super. Ct. 2005) (Popovich, J., concurring and dissenting), *aff'd* 909 A.2d 1224 (Pa. 2006).

183. Commonwealth v. Millward, 830 A.2d 991 (Pa. Super. Ct. 2003), *allocatur denied*, 848 A.2d 928 (Pa. 2004).

184. According to the study by Harris, Nieves, and Place, less than two percent of the nearly 4,000 post-conviction cases they monitored in Allegheny, Delaware, and Philadelphia Counties resulted in a new trial or new sentencing hearing. Harris et al., *supra* note 15, at 490.

185. Commonwealth v. O'Berg, 880 A.2d 597, 602 (Pa. 2005).

186. Commonwealth v. Ahlborn, 699 A.2d 718, 720 (Pa. 1997); 42 PA. CONS. STAT. § 9543(a)(1)(i) (1998); *see also supra* notes 60-61, 174-75 and accompanying text and *infra* notes 203-07.

post-conviction petition.[187] With the type of delay prevalent in Pennsylvania, eighteen months is not enough time for many post-conviction defendants to run their ineffectiveness arguments all the way through the Pennsylvania courts.

A sentence of five years would allow most defendants the opportunity to litigate a post-conviction petition without torturing too much the concept of a "short" sentence. This still would be a problem for any defendant with an unusually long direct appeal or post-conviction proceeding, but it would capture most cases when an exception is needed. This short-sentence exception is not perfect, however, because of the number of defendants who still would be unable to exercise their constitutional rights to appeal and to effective assistance of counsel through no fault of their own, i.e., because their judicial proceedings dragged on until their sentence expired. Despite this problem, this solution is better than nothing at all, and it is something the Pennsylvania Supreme Court can do by itself without overruling any precedent or turning to the legislature for help.[188] If this period would prove to be too short or even too long, it later could be modified.

C. Allow Defendants to Raise Ineffectiveness Issues for the First Time in a Rule 1925(b) Statement

In *Commonwealth v. Davido*,[189] the Pennsylvania Supreme Court held that ineffectiveness issues raised for the first time in a Rule 1925(b) statement[190] may not be addressed on direct appeal.[191] The reason for this, however, was because the record was not complete.[192] If an ineffectiveness issue has been raised in a timely post-sentence motion and evidence has been made part of the record in a hearing, however, an appellate court can then consider the ineffectiveness issue.[193] The problem with this procedure is that the post-sentence motion must be filed within ten

187. *Ostrosky*, 866 A.2d at 432 (Popovich, J., concurring and dissenting).

188. As noted above, the *O'Berg* court did not consider a short-sentence exception in the context of the state constitutional right to appeal or the defendant's due process rights in how that appeal is conducted. *See supra* notes 92-94 and accompanying text. If considered that way, *O'Berg* could be distinguished by the Pennsylvania Supreme Court without the need to overrule it.

189. 868 A.2d 431 (Pa. 2005), *cert. denied*, 126 S. Ct. 660 (2005).

190. *See supra* note 26 (explaining what a Rule 1925(b) statement is).

191. *Davido*, 868 A.2d at 441 n.16.

192. *Id.*

193. Commonwealth v. Bomar, 826 A.2d 831, 853-55 (Pa. 2003).

days of sentencing,[194] which makes this task virtually impossible for a new attorney taking the case on appeal.

If the time for raising an ineffectiveness issue is shifted from the ten days in the post-sentence motion requirement to the time of the filing of the Rule 1925(b) statement (which identifies for the trial court the issues to be raised on appeal),[195] then appellate counsel has a more reasonable time to discover and plead an ineffectiveness issue. Currently, the Rule 1925(b) statement must be filed within fourteen days of when ordered to do so by the trial court.[196] At the court's discretion, this period may be extended.[197] Depending on how long transcript preparation takes, this will provide weeks and sometimes months for appellate counsel to identify potential ineffectiveness claims.[198]

At this stage, the trial court has lost any jurisdiction to rule on the ineffectiveness issues.[199] The court, however, could take evidence without making a ruling, and write an opinion discussing this new evidence.[200] Trial judges harbor a certain reluctance to conduct hearings on ineffectiveness issues.[201] Because of this institutional lack of enthusiasm for hearings, defendants would have to be permitted to argue on appeal that the lower court abused its discretion in not holding a hearing when requested.[202]

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194. PA. R. CRIM. P. 720(A)(1).

195. *See* PA. R. APP. P. 1925.

196. PA. R. APP. P. 1925(b). A proposed amendment to Rule 1925 would enlarge the time period to file the statement to twenty-one days. 36 Pa. Bull. 5967, *available at* http://www.pabulletin.com/secure/data/vol36/36-39/1900.html. One commentator has forcefully argued that the defendant should be permitted six months from the receipt of the transcripts to identify any ineffectiveness issues. Brensike, *supra* note 81 (manuscript at 29-30).

197. Commonwealth v. Castillo, 888 A.2d 775, 778 (Pa. 2005) (recognizing that the appellant could always ask the trial court for more time if it is needed); *see also* Brensike, *supra* note 81 (manuscript at 60) (her proposed rule's time requirement should be a floor of six months, but not a ceiling "in recognition of the fact that some cases may require more time.").

198. *See* Harris et al., *supra* note 15, at 480. "Obtaining the court file and transcripts from the archives appears to be a chronic source of delay throughout the state." *Id.* In Allegheny County, for example, delays of over six months were reported. *Id.*

199. Commonwealth v. May, 887 A.2d 750, 758 (Pa. 2005).

200. This is the procedure for a trial court to follow when, pursuant to a post-conviction petition, it has restored the defendant's right to appeal *nunc pro tunc*. In that situation, it may not rule on the other ineffectiveness issues raised even though it has presided over a hearing concerning those issues. Commonwealth v. Miller, 868 A.2d 578, 580-81 (Pa. Super. Ct. 2005), *allocatur denied*, 881 A.2d 819 (Pa. 2005).

201. *See* Harris et al., *supra* note 15, at 489; Brensike, *supra* note 81 (manuscript at 33-34) ("It comes as no surprise, therefore, that the courts routinely deny defense requests for evidentiary hearings.").

202. *But see* Commonwealth v. Davis, 894 A.2d 151, 153-54 (Pa. Super. Ct. 2006). In *Davis*, the lower court reinstated appellate rights *nunc pro tunc*, but did not conduct an

If this is not an option, trial courts will quickly learn that they can foil any ineffectiveness claim simply by not holding a hearing.

This solution would eliminate all of the problems identified in *Grant* and in *O'Berg*: the record would be complete; the lower court would have written an opinion; the appellate court would not be acting as a fact-finder; the appellate attorney would have sufficient time to investigate; and although the issue would be raised for the first time on appeal, it would have first been addressed by the trial court.

D. Allow Unitary Review of the Direct Appeal and the Post-Conviction Petition

Another suggestion would be to permit unitary review of direct appeals and post-conviction petitions. In other words, when a defendant has filed a direct appeal and also wishes to argue that trial counsel was ineffective, the appeal would be stayed while the trial court considered the ineffectiveness claims. Once the trial court rendered a ruling, that finding would be consolidated with the direct appeal in one appeal to the appellate courts. Several states employ this procedure.[203]

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evidentiary hearing on the other ineffectiveness issues raised in the post-conviction petition. *Davis*, 894 A.2d at 153-54. On the reinstated appeal, Davis claimed that the lower court erred in not holding an evidentiary hearing and also raised two ineffectiveness claims. *Id.* The superior court determined that *Grant* prohibited it from reaching the merits of the ineffectiveness claims because a record had not been created in the trial court on those issues. *Id.* Therefore, the court dismissed the ineffectiveness issues without prejudice to raise them in a post-conviction petition. *Id.* This created the absurd result that the defendant filed a post-conviction petition and had his appellate rights reinstated, which was the worst possible result for him because he was told eighteen months later that he had to file yet another post-conviction petition to have his ineffectiveness issues considered. *Id.* Davis asked the superior court to remand for an evidentiary hearing in the trial court, but it held that it was unable to remand for an evidentiary hearing. *Davis*, 894 A.2d at 154.

203. *See, e.g.*, Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). In Indiana, for example, the procedure works this way:

> where it is necessary on appeal to develop an additional evidentiary record to evaluate the reasons for trial counsel's error, the proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings. . . . This procedure for developing a record for appeal is more commonly known as the *Davis/Hatton* procedure. As we explained, the *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. . . . If the appellate court preliminarily determines that the motion has sufficient merit, the entire case is remanded for consideration of the petition for post-conviction relief. . . . If, after a full evidentiary hearing the post-conviction relief petition is denied, the appeal can be reinitiated. . . . Thus, in addition to the issues initially raised in the direct ap-

If such a system were employed in Pennsylvania, several questions would need to be answered. Would this procedure be available only to defendants with a short sentence, and what would qualify as a short sentence? If it would be available to all defendants, would it be optional or would it be mandatory?[204] Would it replace any post-appeal review or be in addition to it?

One initial obstacle to this proposal is that the Pennsylvania Supreme Court has already struck down a unitary review system that was briefly used in capital cases.[205] The court would have to be willing to revisit this procedure. Even with some turnover in the court, this probably is unlikely.

E. Reverse the Requirement That a Defendant Must Be Serving a Sentence at the Time a Court Is Deciding an Ineffectiveness Issue

The PCRA's requirement that a defendant must be serving a sentence to obtain relief made sense before *Grant* was decided. Then, a defendant who chose to fight a conviction could file an appeal and, theoretically, raise any conceivable issue. This defendant would have had at least one opportunity to fully litigate any issue. After *Grant*, of course, this is not true for ineffectiveness issues. Removing the condition that a defendant must currently be serving the sentence would eliminate the constitutional quan-

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> peal, the issues litigated in the post-conviction relief proceeding can also be raised. . . . This way, a full hearing and record on the issue will be included in the appeal. . . . If the petition for post-conviction relief is denied after a hearing, and the direct appeal is reinstated, the direct appeal and the appeal of the denial of post-conviction relief are consolidated.

Slusher, 823 N.E.2d at 1222. (citations omitted); *see also* Brensike, *supra* note 81 (manuscript at 32 and n.128) (referencing jurisdictions that use this procedure).

204. In other words, must ineffectiveness issues be raised by using this vehicle at the expense of waiving them if they are not raised, or would the defendant have the option of raising them either in unitary review or later in a separate post-conviction proceeding?

205. In 1995, the Pennsylvania Legislature passed the Capital Unitary Review Act (CURA), which created "a bifurcated, but simultaneous, post-trial review process at the trial court level for both post-sentence motions and collateral appeal." *In re* Suspension of Capital Unitary Review Act, 722 A.2d 676, 677 (Pa. 1999) (citing 42 PA. CONS. STAT. § 9571(c) (1995), suspended by No. 224 Crim. Procedural Rules Dkt. No. 2 (Aug. 11, 1997)). Less than two years later, the Pennsylvania Supreme Court struck this down sua sponte because it conflicted with existing rules of court regarding how to administer post-conviction proceedings and capital appeals. *In re Suspension*, 722 A.2d at 677-80. The impediment to resurrecting a similar scheme for short-sentence (or any) defendants is that the court wants the collateral appeal to follow the direct appeal, not to proceed with it. *Id.* at 678-79 ("CURA purported to turn the exclusive process for obtaining collateral review in capital cases into a 'preappeal' process, whereas the exclusive process embodied in this Court's rules was, and is, a 'postappeal' process.").

dary created by *O'Berg*. Acting on its own, the Pennsylvania Supreme Court could remedy this problem in two ways.

First, the court could find that *Commonwealth v. Ahlborn*,[206] which required that a defendant be serving a sentence at the time post-conviction relief is granted,[207] is no longer sustainable after *Grant* and *O'Berg*, at least insofar as ineffectiveness issues are concerned. The decision in *Ahlborn* was purely based upon the language of the PCRA, which requires a person to be "currently serving a sentence" [208] "[t]o be eligible for relief."[209] The court reasoned that unambiguous language like this barred any relief once a sentence is completed regardless of any lingering effects from the conviction.[210]

The predecessor to the PCRA, the Post-Conviction Hearing Act (PCHA), however, contained similar language, but yet allowed for consideration of cases with completed sentences if collateral consequences were possible.[211] Returning to the PCHA methodology — at least for ineffectiveness issues — would allow defendants with short sentences to still litigate these issues. After *Grant* and *O'Berg* divested short-sentence defendants of the opportunity to argue trial counsel's ineffectiveness, the court could conclude that revisiting *Ahlborn* was necessary to correct the problem created by those cases.[212]

Second, the court could find that the PCRA's currently serving requirement is unconstitutional as it applies to ineffectiveness issues. In other words, the PCRA in conjunction with *O'Berg* cannot be used to deprive defendants of their constitutional right to appeal and their constitutional right to enforce their right to effective assistance of counsel. The court could find the currently-serving requirement to be generally constitutional, but invalid if it

206. 699 A.2d 718, 720 (Pa. 1997).

207. *Ahlborn*, 699 A.2d at 720 ("To be eligible for relief a petitioner must be *currently* serving a sentence of imprisonment, probation or parole. To grant relief at a time when appellant is *not* currently serving such a sentence would be to ignore the language of the [PCRA] statute.").

208. 42 PA. CONS. STAT. § 9543(a)(1)(i) (1998).

209. 42 PA. CONS. STAT. § 9543(a)(1).

210. *Ahlborn*, 699 A.2d at 720-21.

211. 42 PA. CONS. STAT. § 9543(a)(2), *amended by* the Post-Conviction Relief Act, 42 PA. CONS. STAT. § 9543 (1988).

212. *But see* Commonwealth v. O'Berg, 880 A.2d 597, 604 (Pa. 2005) (Castille, J., concurring) (Justice Castille, though speaking only for himself, pointed out that *Ahlborn* preceded *Grant* and, thus, the court understood that some defendants with a short sentence might be unable to obtain relief).

deprived a defendant of any opportunity to ever argue trial counsel was ineffective.[213]

F. Amend the PCRA to Allow Litigation of Ineffectiveness Issues Even When a Sentence Is Completed

A final solution is to allow any defendant with an expired sentence to pursue an ineffectiveness issue in a post-conviction petition. Also, if a sentence has expired during the litigation of the post-conviction petition, the court should still decide it as it would a direct appeal with a completed sentence.

This would make the ineffectiveness issues more like an extension of the direct appeal rather than a collateral attack requiring that the Commonwealth have custody and control over the defendant.[214] A direct appeal is not moot simply because the defendant has completed the sentence or even received a sentence of no jail time at all.[215] If post-conviction ineffectiveness issues were considered in the same way, the defendant's state constitutional right to an appeal would be fully realized, and the constitutional due process concerns created by *O'Berg* would evaporate.[216]

This hardly would open up any flood gates to a wave of post-conviction petitions. First, most defendants in this category with a short sentence will not appeal their convictions in the first place. Often, they are happy with the result and will not try to upset it.

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213. *But see* O'Berg, 880 A.2d at 604 (Castille, J., concurring) (in discussing the currently serving requirement of the PCRA, Justice Castille wrote that he believed that "[t]here is nothing unreasonable, unwise, or unconstitutional with such a construct").

214. *Id.* at 603-04 (arguing that the PCRA is only available to those under the custody and control of the Commonwealth). Perhaps a limit on this extension of the PCRA could be for claims only involving trial counsel's ineffectiveness. If it was limited to issues of trial counsel's ineffectiveness, this would mean that the defendant at least would have had one opportunity to have any conceivable trial issue reviewed on appeal. This would be the bare minimum to fulfill the guarantee of the right to an appeal in article V, section 9 and it would remove the due process concerns attached to an appeal. Such a limit, however, could lead to confusion and extended litigation over the scope (and even the constitutionality) of such a restriction. To avoid this uncertainty, the Legislature certainly could extend to all defendants the ability to file after the sentence is completed.

215. *See* Commonwealth v. Clark, 746 A.2d 1128, 1130-31 (Pa. Super. Ct. 2000) (en banc) (an appeal may follow even when the sentencing court, explicitly or implicitly, imposes a sentence of no further penalty), *allocatur denied*, 764 A.2d 1064 (Pa. 2000).

216. This solution cures only the constitutional problems created by *Grant* and *O'Berg*. It does nothing to remedy the other problems those cases create, such as an innocent person sitting in jail longer than necessary or evidence becoming stale over the extra time it takes to litigate a post-conviction petition. *See supra* notes 82-84 and accompanying text. The goal of this article is to find a solution to the constitutional deprivation suffered by the short-sentence defendant, not to create a global solution to the *Grant* deferment construct. For a workable and sensible counter to the *Grant* framework, see generally Brensike, *supra* note 81.

They would be just as unlikely to file a post-conviction petition. Second, of the defendants who do want to attack their conviction or sentence, most defendants who have completed their sentence will lack the motivation to file and pursue a post-conviction petition.[217] Even many defendants who complete their sentence during the pendency of a post-conviction petition will lose interest. Third, some issues, by their nature, will become moot in the same way as if they had been considered on a direct appeal. For example, a defendant who wants to argue that his attorney was ineffective for failing to argue that his sentence was excessive will be unable to obtain any relief once his or her sentence has been finally served. In other words, even if the sentence was too harsh, a court can offer no relief such as a shorter sentence after the sentence is completed. The bottom line is that few defendants will have completed their sentence *and* still wish to pursue a claim that their trial attorney was ineffective. Finally, the PCRA's one-year statute of limitations[218] will restrict the number of defendants eligible to file a timely post-conviction petition.

For those defendants who are affected, however, fighting the conviction is often quite important to them. They may be fighting their conviction because they are subjected to Megan's Law,[219] or have lost their driver's license,[220] or no longer may own and possess a firearm because of this conviction.[221] In the post-9/11 world, any non-citizen faces deportation for all but the most minor convictions.[222] For some, it may be the only conviction in their life and they want their record to be clean. For others who will revisit the criminal justice system with another conviction, this subsequent conviction may later lead to a sentence enhancement that can increase a sentence many times over.[223] To these people, the

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217. *See* Brensike, *supra* note 81 (manuscript at 14).

218. 42 PA. CONS. STAT. § 9545(b) (1998).

219. *See* 42 PA. CONS. STAT. §§ 9791-9799.5 (2000). For example, a person convicted of a Megan's Law predicate crime and found to be a sexually-violent predator (SVP) will be subject to community notification of the SVP status for the remainder of his or her lifetime, will have to attend monthly counseling sessions for the remainder of his or her life, and will have to submit to lifetime registration. 42 PA. CONS. STAT. §§ 9795.1, 9795.4, 9796(a), 9798, 9799.4.

220. For example, being convicted of driving under the influence triggers the suspension of a driver's license. 75 PA. CONS. STAT. § 3804(e) (2006).

221. 18 PA. CONS. STAT. § 6105 (2000) (a person convicted of an enumerated crime may not own or possess a firearm "regardless of the length of sentence").

222. Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 701 (2006).

223. For example, Pennsylvania's third-strike statute raises a possible sentence from ten to twenty years to twenty-five to fifty years or even to life without parole. 42 PA. CONS.

conviction may mean drastic changes to their lives, and they will have the motivation to continue to fight their conviction even after their sentence is completed.[224]

The one drawback to this proposal is that it would require the Legislature to amend the Post-Conviction Relief Act. The amendments the Legislature has made in the past two decades have been to reduce the availability of the PCRA, not increase it.[225] In *Grant*, however, both the Commonwealth and the Attorney General were opposed to changing the *Hubbard* rule.[226] Perhaps a convergence of these forces could convince the Legislature to take this action to guarantee that all criminal defendants will be able to enforce their constitutional right to counsel.[227]

STAT. § 9714(a)(2) (1998). Even for minor crimes, subsequent convictions may lead to drastically-increased punishment. *See* 18 PA. CONS. STAT. § 3929(b)(1) (1983) (a first retail theft of under $150 is a summary offense (punishable by up to ninety days incarceration), but a third or subsequent offense is a third-degree felony punishable by up to seven years imprisonment).

224. This is why the United States Supreme Court has presumed collateral consequences will follow a conviction. *See supra* notes 147-55 and accompanying text. Justice Castille's *O'Berg* concurrence is completely insensitive to these consequences. *See supra* notes 89-91 and accompanying text.

225. For example, when it amended the PCRA in 1995, the Legislature added the requirement that a petition must be filed within one year of when the defendant's conviction became final. 42 PA. CONS. STAT. § 9545(b) (1998). It also removed as a ground for relief a situation involving "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner." 42 PA. CONS. STAT. § 9543 historical note (1998). *See generally* Harris et al., *supra* note 15, at 468-74 (chronicling the forty-year history of Pennsylvania's Post-Conviction Relief Act and its predecessor, the Post-Conviction Hearing Act).

226. *See* Commonwealth v. Grant, 813 A.2d 726, 740 (Pa. 2002) (Saylor, J., concurring); *see also supra* notes 86-87 and accompanying text (discussing these positions in *Grant*).

227. Collateral issues with a rule change like this, though important, are beyond the scope of this article. For example, defendants with a short sentence have a broad right to bond pending appeal. Pennsylvania Rule of Criminal Procedure 521(B)(1) says that "[w]hen the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as before verdict" unless the court has made a ruling changing bail. The right for bond during a PCRA proceeding is virtually non-existent. Commonwealth v. Bonaparte, 530 A.2d 1351, 1355 (Pa. Super. Ct. 1987) ("we conclude that such motions should only be granted in exceptional cases for compelling reasons"). This means that a pre-*Grant* defendant with ineffectiveness issues and a short sentence likely would have been released on bond pending the appellate decision. A post-*Grant* defendant with the same issue likely will be on bond while the appellate courts consider any preserved issues, but will have to report to serve his or her sentence while the post-conviction process runs its course.

Another important issue beyond the scope of this article is the second-class status afforded to post-conviction petitions. For example, any defendant on direct appeal may have oral argument even if the issues are meritless. A defendant on appeal from the denial of a post-conviction petition, however, is not entitled to oral argument even if the issues are meritorious. PA. R. APP. P. 2311(b). While this may seem insignificant, it is indicative of the culture that de-emphasizes and discounts post-conviction petitions regardless of whether they have merit. *See* Harris et al., *supra* note 15, at 492 ("The low status of PCRA petitions

VIII. CONCLUSION

The application of the *Grant* deferment rule to short-sentence defendants in *O'Berg* violates that group of defendants' constitutional rights to due process and to appeal by depriving them of any forum in which to vindicate the denial of their constitutional right to effective assistance of counsel. All defendants, regardless of the length of their sentence or the seriousness of their charges, have a constitutional right to argue that their trial attorney was ineffective. Which solution is chosen is not as important as recognizing the problem and, consistent with the Constitution, somehow restoring the ability for all defendants to be certain that they will not suffer convictions obtained with constitutionally ineffective counsel.

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derives, in part, from the shared perception among the bench and bar that most post conviction claims are frivolous.").

In the new world after *Grant*, this is important because meritorious ineffectiveness issues are less likely to be found by courts. *See* Brensike, *supra* note 81 (manuscript 4 n.22) (collecting discussions on the small number of post-conviction cases in which relief is granted). If the institutional mindset starts from a belief that claims are frivolous, post-conviction defendants face an almost impossible hurdle. Pre-*Grant* defendants on direct appeal did not have an easy task to convince a court that their trial attorney was ineffective. For example, 20.1% of all appellate cases in 2002 (the year that ended with the *Grant* opinion) resulted in some relief being granted to the appellant. *See* Superior Court of Pennsylvania Annual Report 2002 at 6, http:www.superior.court.state.pa.us/ar2002/SuperiorCourt_AR_2002.pdf (the results were not categorized by issues raised or even by civil versus criminal cases). The study by Harris, Nieves, and Place, on the other hand, found that less than two percent of the nearly 4000 post-conviction cases they monitored in Allegheny, Delaware, and Philadelphia Counties resulted in a new trial or new sentencing hearing. Harris et al., *supra* note 15, at 490. Perhaps courts will view PCRA petitions differently after *Grant*, but institutional biases like this can be very hard to change.